Supreme Court, U.S.
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No.

In the Supreme Court of the United States

BASF CORPORATION,

Petitioner,

v.

RONALD PETERSON, ET AL.

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Minnesota

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *BASF Corp.* v. *Peterson*, 544 U.S. 1012 (2005), this Court granted a prior petition for certiorari in this case, vacated the Minnesota Supreme Court's judgment, and remanded the case for reconsideration in light of *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431 (2005). On remand, the Minnesota Supreme Court reinstated its prior judgment. As in the previously filed petition, the questions presented are:

1. Whether the Federal Insecticide, Fungicide, and Rodenticide Act preempts a state law claim that seeks to impose liability for engaging in commercial practices that are required or authorized by FIFRA and its implementing regulations.

2. Whether the First Amendment prohibits a state law claim that a manufacturer committed an unconscionable commercial practice by (a) distributing a truthful magazine article on a subject of public importance and (b) accurately reporting to responsible government officials the unlawful use of the manufacturer's products.

RULE 14.1(b) STATEMENT

The following are the parties to the proceeding in the Minnesota Supreme Court:

1. Ronald Peterson
2. Barry Thune
3. Owen Larson
4. Owen Larson Farms, Inc.
5. Duane Evenson
6. Jeffrey Nesvig
7. Richard Moen
8. Christopher Grove
9. Christopher Grove Farms, Inc.
10. David Abentroth
11. Glenn Asbeck
12. Asbeck, Inc.
13. Donald Steinbeisser
14. Joe G. Steinbeisser & Sons, Inc.
15. Stephen Pust
16. Stephen Pust Farms, Inc.
17. All persons who purchased the herbicide Poast between January 1, 1992, and December 31, 1996, for use on their crops, except North Dakota residents who purchased Poast in North Dakota
18. BASF Corporation

RULE 29.6 STATEMENT

BASF Corporation is a wholly-owned subsidiary of BASF Americas Corporation. BASF Americas Corporation is a wholly-owned subsidiary of BASFIN Corporation, which, in turn, is a wholly-owned subsidiary of BASF Aktiengesellschaft. BASF Corporation, BASF Americas Corporation and BASFIN Corporation are not publicly held. The stock of BASF Aktiengesellschaft is traded publicly in Germany and other countries outside the United States, and its American Depository Receipts are listed on the New York Stock Exchange for trading in the United States.

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OPINIONS BELOW

The opinion of the Minnesota Supreme Court (App., *infra*, 1a–24a), the final state court decision on the first question presented, is reported at 711 N.W.2d 470. The opinion of the Minnesota Court of Appeals (App., *infra*, 25a–53a), the final state court decision on the second question presented, is reported at 657 N.W.2d 853. A prior opinion of the Minnesota Supreme Court (App., *infra*, 55a–81a), which this Court vacated (App., *infra*, 54a), is reported at 675 N.W.2d 57.

JURISDICTION

The opinion of the Minnesota Supreme Court was issued on March 30, 2006, and final judgment was entered on June 19, 2006. App., *infra*, 101a–103a. Justice Alito extended the time for filing a petition for a writ of certiorari until July 28, 2006. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The constitutional, statutory and regulatory provisions involved are set forth in the Appendix. App., *infra*, 107a–111a.

STATEMENT

In this nationwide class action brought under the New Jersey Consumer Fraud Act (NJCFA), respondents claimed that petitioner BASF Corporation committed an "unconscionable commercial practice" (N.J. Stat. Ann. § 56:8-2) by "leading farmers to believe" that a particular pesticide "could only be used" on crops listed on the pesticide's label (App., *infra*, 16a (citation omitted)), even though the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 *et seq.*, and its implementing regulations made it unlawful for farmers to use the pesticide on any crops other than those the manufacturer included on the label. Respondents further claimed that BASF committed fraud by labeling two supposedly "identical" pesticides as different products, even though FIFRA regulations precluded BASF from marketing the two pesticides as the same product given their significant chemi-

cal differences. Respondents also contended that BASF acted unconscionably by sponsoring an *accurate* magazine article informing readers that the off-label use of pesticides is illegal under FIFRA and by giving *truthful* information to state regulatory authorities that led to the successful prosecution of some farmers and dealers for illegal off-label pesticide use.

Minnesota's appellate courts upheld a $52 million judgment for respondents, rejecting BASF's arguments that (1) FIFRA preempts the action and (2) the First Amendment precludes respondents from premising liability on BASF's truthful speech. This Court granted BASF's petition for certiorari, vacated the state court's judgment, and remanded the case for reconsideration in light of *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431 (2005). *Bates* made clear that FIFRA preempts state-law rules that diverge from FIFRA's labeling requirements and that courts must inform juries of FIFRA's requirements in cases involving pesticide labeling issues — an important step that the trial court refused to take here.

On remand from this Court, the Minnesota Supreme Court reinstated its prior judgment. This Court should not permit that decision to stand. It departs from *Bates* and is inconsistent with FIFRA, undermining important federal policies that are essential to safeguard human health, the environment, and the Nation's food supply. And by premising liability on accurate statements concerning matters of public concern, the decision below establishes a standard that is certain to chill protected speech. For these reasons, this Court should again grant BASF's petition for certiorari and, this time, should reverse the judgment below.

1. Regulatory Background. FIFRA is a "comprehensive regulatory statute" that governs the labeling, sale, and use of pesticides (including herbicides). *Wisconsin Pub. Intervenor* v. *Mortier*, 501 U.S. 597, 601 (1991). It sets out three rules that are especially relevant here.

First, a pesticide may not be distributed or used unless it has been registered *both* by the Environmental Protection Agency *and* by state authorities where it is to be sold or used. 7 U.S.C. §§ 136a(a), 136v(a). See Tr. 2661–2662 (all 50 states require separate state registration of pesticides).

Second, FIFRA and its implementing regulations are the exclusive source of requirements for pesticide *labeling*. Once the EPA determines that a pesticide label "compl[ies] with [FIFRA's] requirements" (7 U.S.C. § 136a(c)(5)(B)), FIFRA expressly provides that a state "shall not impose or continue in effect any requirements for labeling * * * in addition to or different from those required under this subchapter." 7 U.S.C. § 136v(b). This provision "pre-empts any statutory or common-law rule that would impose a labeling requirement that diverges from those set out in FIFRA and its implementing regulations." *Bates*, 544 U.S. at 452.

Third, a pesticide's label — not its federal registration — determines the uses to which the product lawfully may be put, and the manufacturer may choose *not* to label the pesticide for uses that would otherwise be permissible. The label must identify the pesticide's authorized uses. 7 U.S.C. §§ 136(q)(1)(A), 136j(a)(1)(F). FIFRA prohibits the use of any pesticide "in a manner inconsistent with its labeling" (*id.* § 136j(a)(2)(G)) and bars the promotion of "off-label" pesticide use. See *id.* § 136j(a)(1)(B); Pesticide Registration Procedures, 53 Fed. Reg. 15952, 15957 (May 4, 1988). In addition, and of particular importance here, the EPA's "subset labeling" rule expressly authorizes a manufacturer to *omit* EPA-approved uses from product labeling. See 40 C.F.R. § 152.130(b); Pesticide Registration Procedures, 53 Fed. Reg. 15952, 15957 (May 4, 1988). If a manufacturer employs subset labeling, the pesticide may lawfully be used *only* for the purposes listed on the label. 7 U.S.C. § 136j(a)(2)(G).

2. Factual Background. "Major crops," such as soybeans, corn, and cotton, are farmed on millions of acres but provide farmers with a relatively low financial return per acre. "Mi-

nor crops," which include dozens of widely varied crops such as sugar beets, vegetables, grapes, citrus fruit, and berries, are farmed on far fewer acres but yield higher profits per acre. Tr. 3283. Because of higher development, testing, and registration costs, lower sales volumes, and higher liability risks, many pesticide manufacturers have been reluctant to sell pesticides for the minor crop market, and many minor crop farmers have had difficulty finding pesticides that meet their needs. Tr. 878–879, 1406, 1421, 1787–1788, 2123–2124, 2582, 3336; D. Exs. 353, 356, 362, 493, 515, 629, 630.

In 1983, BASF first registered its pesticide "Poast," a herbicide, with the EPA for use only on major crops. Responding to requests from farmers, BASF subsequently undertook to make Poast available for minor crops. *Ibid.* See also P. Ex. 234. After conducting extensive and costly additional safety testing on minor crops (Tr. 895–896, 903), BASF applied for and received federal and state registration to label and sell Poast for use on over 60 crops, including most minor crops. D. Ex. 694. Respondents testified that Poast was an excellent pesticide which increased their yields and their profits. See Tr. 347–348, 585–586, 1217, 1690, 2178–2179.

BASF developed another herbicide, "Poast Plus," to address problems that arose when Poast reacted antagonistically with agricultural chemicals commonly used on soybeans. Tr. 892–893. Poast Plus has the same active ingredient as Poast (sethoxydym), but it also contains a newly-invented, patented adjuvant that solves the chemical antagonism problem. Tr. 2736–2743. In 1989, BASF registered Poast Plus with the EPA. Because of the significant chemical differences between Poast and Poast Plus — and to ensure that the new Poast Plus would not be confused with Poast — EPA rules *required* BASF to register Poast Plus as a separate product from Poast and to market it under a different name. See 40 C.F.R. §§ 152.15, 152.43, 158.175; EPA, Label Review Manual (3d. ed.), Ch. 12: Labeling Claims, at Part IV.C.

Initially, BASF registered Poast Plus with the EPA for use

on soybeans and three other major crops. In 1992, relying on the same residue data that it had used to seek expanded EPA registration of Poast, BASF also registered Poast Plus with the EPA for use on a broad range of minor crops. See App., *infra*, 58a.

BASF was not ready, however, to market Poast Plus for minor crops. Although BASF had performed thousands of crop-safety tests before marketing Poast for minor crops, it had not yet as fully tested Poast Plus on those crops. D. Ex. 1160; Tr. 3006. Furthermore, the early testing revealed that Poast Plus posed a greater risk of crop damage than Poast. Tr. 922. Finally, BASF's tank-mix testing — which the EPA does not require but which BASF uses to assess the real-world performance of its products — showed that Poast Plus became riskier when mixed in spray tanks with other chemicals commonly used on minor crops. Tr. 2921–2922. For these reasons, BASF scientists insisted on more crop-safety testing before the company sold Poast Plus for use on minor crops. Tr. 2923, 2946; D. Exs. 387, 392, 395, 414, 415, 442, 475, 505, 749 ("Phyto[toxicity] data required before use"). Accordingly, BASF did not seek to register Poast Plus for minor crops in any state,[1] and it did not list minor crops on the final product labeling. This meant that, although *Poast* could lawfully be used both on major and minor crops, farmers could use *Poast Plus* only on major crops.

Initially, BASF sold Poast Plus for about the same price as Poast. Tr. 3385. In the early 1990s, competition in the major-crop pesticide market led BASF to lower the price of Poast Plus. Tr. 3386–3387. Between 1992 and 1996, Poast Plus cost less than Poast. In 1996, competing products entered the minor crop market (Tr. 3387), and BASF eventually lowered Poast's price below that of Poast Plus. D. Ex. 1136.

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[1] California declined to register Poast Plus for *any* use (even though it had registered *Poast* for both major and minor crops) because the State was not satisfied with BASF's toxicity studies. C. Sanson Affidavit (Feb. 4, 2000) ¶¶ 9, 10; D. Exs. 399, 432, 509.

3. Respondents' Claims. Respondents purchased Poast when it was more expensive than Poast Plus. App., *infra*, 58a, 62a. The essence of respondents' position is that BASF should have sought "state registration of Poast Plus on all the crops" (*id.* at 75a) and labeled Poast Plus for use on minor crops, but instead "misled and deceived American farmers into believing that * * * Poast Plus[] could not be used on [minor] crops such as sugar beets." App., *infra*, 55a. This conduct, respondents concluded, unfairly kept farmers from using the then-cheaper Poast Plus on minor crops. As articulated in respondents' complaint, much of their case was directed at BASF's labeling. The complaint alleged that the Poast Plus label prevented farmers from learning that Poast Plus was supposedly "identical" to Poast (Tr. 1166; Second Amend. Cmplt. (hereinafter "Cmplt.") ¶ 2); from discovering that the EPA had registered Poast Plus for the same uses as Poast (Tr. 1420; Cmplt. ¶ 3); and, from lawfully using Poast Plus on their minor crops (Tr. 1169–1170; Cmplt. ¶ 12).

Respondents brought their claim under the NJCFA, which makes illegal "'any unconscionable commercial practice.'" App., *infra*, 60a n.7 (quoting N.J. Stat. Ann. 56:8-2). As explained by the court below, "'[u]nconscionable commercial practice' in this context is 'an amorphous concept obviously designed to establish a broad business ethic.'" *Ibid.* (citation omitted). Moreover, "[t]he NJCFA provides that an offense arises 'whether or not any person has in fact been misled, deceived or damaged thereby.'" *Id.* at 77a (citations omitted).

4. Trial Court Proceedings. After certifying a nationwide class action under the New Jersey statute, the trial court granted summary judgment for BASF, finding no violation of the Act as a matter of law. App., *infra*, 91a–100a. This decision was reversed on appeal, and the case was remanded for trial. *Id.* at 90a.

Much of respondents' evidence at trial attacked BASF's labels. Respondents repeatedly testified that the omission of minor crops from the Poast Plus label was "false" and "de-

ceptive," wrongfully concealing that the EPA had registered the pesticide for use on those crops. See, *e.g.*, Tr. 1397–1398 (labels "deceptive" in stating "that Poast Plus could be used only on those four crops"); Tr. 590 (label "says you can't use it [for minor crops], but in actuality the registration said it's okay"); Tr. 1448 ("we were being deceived * * * [because] the crops that were registered for * * * and what was actually put on the label are two different things"); Tr. 1420 ("it could have been used on other crops and * * * the label says only the four crops"); Tr. 1205 ("I'd like to send a message to the industry * * * that you shouldn't lie on the label.").

That contention also was a prominent theme in the questions and closing arguments of respondents' counsel, who repeatedly referred to "the things you thought were deceptive about the Poast Plus label." Tr. 1238. See, *e.g.*, Tr. 380 ("When you in the business of selling herbicides find out that a label does not accurately reflect the EPA registration status for residue purposes, what does that do to your trust in the label?"); Tr. 205 ("we've gone through the subject of deceptive packaging"); Tr. 3549 ("We should have trust in the label, and what BASF did was to destroy the trust that consumers should have in that label."). In addition, respondents contended that BASF's promotional materials were deceptive in stating — consistent with the Poast Plus label — that Poast Plus's registration was limited to four major crops and that Poast was the only post–emergent grass killer registered for minor crops. App., *infra*, 17a, 59a.[2]

Respondents likewise argued that BASF's use of "subset labeling" wrongfully prevented farmers from using Poast Plus on minor crops. They contended that, by omitting minor crops from the Poast Plus label, BASF implemented "a

[2] Respondents argued that this advertising was false because Poast Plus also was registered *with the EPA* for use on minor crops. Respondents concede, however, that *no state* had registered the pesticide for such use, and farmers therefore could not lawfully use the pesticide on minor crops anywhere. See pages 3 and 5, *supra*.

scheme whereby farmers could be prosecuted for 'off-label' use of Poast Plus." Pl. Cons. Mem. in Opp. to BASF's Mot. In Limine, at 12. One named plaintiff identified this as the principal "basis of [his] complaint against BASF," testifying that it was "unfair, unethical, [and] immoral" for BASF not to label Poast Plus for minor crops when "both [Poast and Poast Plus] were registered by EPA." Tr. 1169–1170.

To support their theory that BASF acted "unconscionably," respondents relied heavily at trial on BASF's speech. Over BASF's objections, respondents presented evidence that, in 1993, BASF's public relations firm submitted an article to *Sugarbeet Grower* magazine discussing the illegality and danger of off-label use of pesticides. P. Ex. 253B. State regulatory officials quoted in the article later testified that the article was accurate and helpful. Tr. 1905–1906. Respondents agreed that the article contained "good information" (Tr. 3773), but contended that BASF sponsored and distributed it "for the wrong purpose" (*ibid.*) — *i.e.*, to intimidate farmers so they would not illegally use Poast Plus off-label.

Respondents also presented evidence that, in 1992 and 1993, one of BASF's sales representatives informed North Dakota authorities of substantial sales of Poast Plus to retailers in areas where few major crops are grown. P. Ex. 258; Tr. 1859–1861. The State Department of Agriculture investigated the report and ultimately charged a number of dealers and growers with illegal off-label use of Poast Plus, resulting in guilty pleas and fines. P. Ex. 258; Tr. 518–521, 1861, 1912. Respondents asserted that BASF's reports to government officials, although undisputedly accurate, represented an unconscionable and actionable effort to prevent farmers from illegally using Poast Plus on minor crops. See, *e.g.*, Tr. 3777.

BASF sought but was denied a jury instruction that would have barred the jury from basing liability on conduct required or authorized by FIFRA and EPA regulations. Tr. 3608–3609. The trial court also refused to instruct the jury about

any of BASF's rights and obligations under FIFRA or state pesticide regulatory regimes. Tr. 3831–3850. Instead, the trial court simply instructed the jury that the NJCFA imposes liability if the defendant has committed an act or omission that departs from "fair dealing," even absent any evidence of malice, scienter, reliance, or causation of injury. Tr. 3839–3842. Exploiting the absence of any instruction on FIFRA's requirements, respondents' counsel argued to the jury that they were free to ignore the federal labeling regime in deciding whether to hold BASF liable under that amorphous state-law standard. Tr. 3748.

The jury returned a $15 million verdict, which under the NJCFA was automatically trebled to $45 million. After adding interest and attorney's fees, the court entered judgment against BASF in the amount of $52 million.

5. State Intermediate Appellate Court Proceedings. The Minnesota Court of Appeals upheld the jury's verdict in all respects. App., *infra*, 25a–53a. Most significantly for present purposes, the court of appeals rejected BASF's contention that the First Amendment prohibits the use of truthful speech and accurate reports to regulatory authorities as a basis for tort liability. According to the court of appeals, the First Amendment provided no protection to the *Sugarbeet Grower* article because this "consumer fraud action [] does not raise a libel claim." *Id.* at 47a. As for the regulatory complaints, the court held the First Amendment inapplicable because "there is no claim that the reports that BASF seeks to protect were defamatory or that prior restraint was at issue." *Id.* at 46a. The Minnesota Supreme Court declined to consider this holding (*id.* at 64a), either in its original decision or on remand from this Court, making the appellate court's decision the final state court ruling on the First Amendment issue.

6. Initial State Supreme Court Decision. The Minnesota Supreme Court granted review on the FIFRA issues raised by BASF, but rejected BASF's preemption argument on the merits. App., *infra*, 55a–81a. Although acknowledging that

"FIFRA preempts state actions relating to labeling and packaging" (*id.* at 71a), the court stated that "the farmers' claims of unconscionable commercial conduct derived from statements and actions that went beyond the label." *Id.* at 74a. The court cited BASF's alleged "misrepresentations about Poast Plus' EPA registration status" in advertisements and in a meeting with North Dakota regulators (*id.* at 75a), and its "failure to seek state registration for Poast Plus on all the crops." *Ibid.* The court also pointed to BASF's alleged efforts "to prevent word spreading that Poast Plus was registered for use by minor crops" (*id.* at 73a) — that is, the company's "inform[ing] authorities that farmers were using Poast Plus on minor crops" and "submit[ting] a magazine article discussing increased enforcement of fines for failing to follow label recommendations." *Ibid.* The court did not address the propriety or effect of respondents' repeated direct attacks at trial on the EPA-approved pesticide labels.

7. **Bates *And The Decision On Remand.*** BASF sought certiorari in this Court. While BASF's petition was pending, the Court decided *Bates*. That decision held that FIFRA's preemption provision reaches only state labeling and packaging requirements (544 U.S. at 443), but also made clear that FIFRA *does* "pre-empt[] any statutory or common-law rule that would impose a labeling requirement that diverges from those set out in FIFRA and its implementing regulations," "emphasiz[ing] that a state-law labeling requirement must in fact be equivalent to a requirement under FIFRA in order to survive pre-emption." *Id.* at 452–53. The Court added that, if a case involving FIFRA preemption "proceeds to trial, the court's jury instructions must ensure that nominally equivalent [state and federal] labeling requirements are *genuinely* equivalent. If a defendant so requests, a court should instruct the jury on the relevant FIFRA misbranding standards, as well as any regulations that add content to those standards." *Id.* at 454 (emphasis in original).

Following the decision in *Bates*, respondents urged the

Court to deny BASF's petition for certiorari, arguing that the preemption rule set forth in *Bates* did not apply because they challenged "unconscionable" marketing practices rather than the accuracy of pesticide labels. See generally Respondent Farmers' Suppl. Br. Opposing BASF's Apr. 27, 2005, Suppl. Br., *BASF Corp.* v. *Peterson*, 544 U.S. 1012 (2005) (No. 04-81), 2005 WL 1024619. This Court, however, rejected respondents' argument. It granted BASF's petition, vacated the Minnesota Supreme Court's judgment, and remanded the case for reconsideration in light of *Bates*. App., *infra*, 54a.

On remand, the Minnesota Supreme Court reinstated its prior judgment. App., *infra*, 1a–24a. The court understood *Bates* to hold that "FIFRA preemption applies only if the state requirement on which liability is based is directly addressed to labeling or packaging." *Id.* at 13a. Here, the court continued, "[t]he farmers assert that their claims are not based on the content of the product labels, but rather on the deceptive, fraudulent, and unconscionable nonlabel actions of BASF in pursuing its planned marketing strategy to segment the use of Poast and Poast Plus." *Id.* at 15a. The court found crucial "'the farmers' point * * * that *even if* BASF's labels were technically accurate, BASF could and did commit consumer fraud by leading farmers to believe that the cheaper Poast Plus could only be used on major crops.'" *Id.* at 16a (emphasis in original; citation omitted). In support of this assertion, the court cited the *Sugarbeet Grower* article "discussing increased enforcement of fines for failing to follow label recommendations." *Ibid.* The court did not address the FIFRA regulations providing that Poast Plus could in fact be used *only* on major crops, and again did not address the propriety or effect of respondents' repeated direct attacks at trial on BASF's reliance on EPA labeling regulations.

The Minnesota Supreme Court also rejected BASF's argument that the jury should have been instructed on FIFRA's labeling regulations. The court acknowledged *Bates*' direction that "courts 'should instruct the jury on the relevant FI-

FRA misbranding standards, as well as any regulations that add content to those standards.'" App., *infra*, 22a. But the court declined to follow that guidance because it did "not understand [this Court's statement] to require instructions on FIFRA regulations in every case in which FIFRA preemption is raised." *Ibid.* Although a large volume of evidence and argument about "deceptive" labeling had been admitted over BASF's objection at trial, the court below held that such an instruction was not warranted here because "[t]his case * * * did not involve claims of deceptive labeling, but rather deceptive nonlabel conduct." *Id.* at 23a.

REASONS FOR GRANTING THE PETITION

The decision of the Minnesota Supreme Court in this nationwide class action directly conflicts with FIFRA's labeling requirements. FIFRA and its implementing regulations provide that manufacturers may omit particular uses from pesticide labels, that the labels determine how a pesticide may lawfully be used, that manufacturers may not promote off-label use, and that a pesticide may in no event be used for a particular crop unless it is registered for that use by *both* the EPA *and* state authorities. The Minnesota court's holding departs from each of these controlling federal principles: BASF was held liable under state law because it did not market Poast Plus for use on minor crops, even though the product was *not* labeled by BASF or registered with state authorities for such use. BASF thus was punished for engaging in conduct that federal law expressly permits. The court compounded this disregard for federal standards by allowing respondents to establish their claim through an attack on conduct that complies with EPA labeling regulations, notwithstanding this Court's ruling in *Bates* that FIFRA "pre-empts any statutory or common-law rule that would impose a labeling requirement that diverges from those set out in FIFRA and its implementing regulations." *Bates*, 544 U.S. at 452.

In upholding the judgment against BASF despite its evident inconsistency with the FIFRA labeling regime, the court

below permitted respondents to evade FIFRA preemption through the simple expedient of purporting to challenge marketing practices — even though FIFRA's labeling rules authorize the challenged practices and even though respondents established their claim through evidence attacking the accuracy of pesticide labels. This holding makes a mockery of FIFRA's labeling rules and preemption provision. Given the malleability of the claims that may be brought under state statutes targeting "unconscionable" commercial practices, the standards announced below make it child's play for plaintiffs to impose different and additional labeling requirements while ostensibly premising liability on something else.

And that is not the end of the mischief caused by the holding below: the decision discards First Amendment protections for any business accused of improper conduct in a consumer fraud action. The Minnesota Court of Appeals ruled that the First Amendment plays no role whatever in such actions, even where, as here, the action directly challenges truthful speech on matters of public importance and accurate reports of possible illegal activity to government agencies. Unless this error is corrected, fear of liability will inhibit the participation of all commercial entities in public discourse.

After the decision in *Bates*, this Court granted BASF's petition for review and vacated the Minnesota Supreme Court's judgment, declining to accept respondents' argument that certiorari should be denied because their claims challenged marketing practices rather than product labels. The Minnesota Supreme Court, however, has now embraced just that superficial distinction. In similar circumstances, where a lower court's decision after remand was in tension with the controlling rule articulated by this Court, the Court has not hesitated to grant review a second time and reverse outright.[3]

[3] See, *e.g.*, *Brown* v. *Payton*, 544 U.S. 133 (2005); *Tennard* v. *Dretke*, 542 U.S. 274 (2004); *Scarborough* v. *Principi*, 541 U.S. 401 (2004); *Greater New Orleans Broad. Ass'n* v. *United States*, 527 U.S. 173 (1999).

Because the decision below departs from the guidance provided by this Court, threatens to have an immediate detrimental impact on the FIFRA program, and promises to chill protected speech across the country, the Court should likewise grant review and reverse the lower court decision here.

I. THE DECISION BELOW CONFLICTS WITH FIFRA LABELING REQUIREMENTS AND IMPORTANT PRINCIPLES RECOGNIZED IN *BATES*

A. The Minnesota Supreme Court's Holding Cannot Be Squared With *Bates* Or FIFRA

The Minnesota Supreme Court opined that the preemption inquiry in this case "is simply about how the farmers' claims are accurately characterized." App., *infra*, 18a. That observation is precisely what went wrong with the decision below: it allows semantics to dictate the outcome of FIFRA preemption disputes. Under the standard announced by the state court, manipulation of a claim's form — rather than consideration of its substance — permits circumvention of FIFRA policies and evasion of the principles stated in *Bates*. Because this issue involves a recurring question of great practical importance, further review is warranted.

1. Respondents' Claims Challenge Pesticide Labeling Regulations. To begin with, claims like respondents' conflict both with specific EPA labeling requirements and with the broader regulatory regime established by FIFRA. In holding to the contrary, the court below reasoned that respondents' "claims are not based on the content of the product labels, but rather on the deceptive, fraudulent, and unconscionable nonlabel actions of BASF in pursuing its planned marketing strategy" (App., *infra*, at 15a) — that is, in asking the EPA to register Poast Plus for minor crops but declining to obtain a similar state registration or to label it for use on minor crops while "leading farmers to believe that the cheaper Poast Plus could only be used on major crops.'" *Id.* at 16a (citation

omitted). But claims of this sort *necessarily* seek to impose labeling requirements "in addition to or different from" the EPA's standards. However respondents now package their claims and whatever the particular acts they describe as "unconscionable," they were not injured because they were misled into "*believing*" that Poast Plus was unavailable for use on minor crops. Given Poast Plus's EPA-approved product label, it is undisputed that Poast Plus was *in fact* unavailable for use on minor crops as a matter of federal law. Respondents' claimed injury thus stemmed from the very fact that Poast Plus *was labeled* in a way that made their preferred use of the product unlawful. This theory of liability directly challenges the use of subset labeling — a practice specifically authorized by the EPA's regulations.

It therefore is not surprising that respondents presented their case to the jury largely as an attack on BASF's product labels and as a challenge to BASF conduct that complied with EPA labeling regulations. See pages 6–8, *supra*. But the significance of this case, and of the Minnesota Supreme Court's error, does not depend on the particular proof presented to the jury here. Wholly apart from the supporting evidence and argument actually advanced by respondents in the trial court, the essence of respondents' claim was that BASF violated state law when it failed to label its products for use as farmers would have liked. Indeed, the measure of damages sought by respondents was the difference in price between Poast and Poast Plus for *every gallon* of Poast sold during the class period, a claim plainly premised on the notion that state law *required* BASF to label Poast Plus for use on minor crops during that period. See App., *infra*, 62a–63a.

The Minnesota Supreme Court acknowledged as much: it characterized respondents' claim as an attack on BASF's "marketing strategy to segment the use of Poast and Poast Plus," holding that "'BASF could and did commit consumer fraud by leading farmers to believe that the cheaper Poast Plus could only be used on major crops.'" App., *infra*, 15a–

16a (citation omitted). But under federal law, Poast Plus *in fact* could lawfully be used only on major crops. Thus, the claim in this case is in essence that BASF committed fraud by *labeling* the product in a manner that limited its use in exactly the manner that EPA regulations authorize.[4]

2. FIFRA Preempts Respondents' Claims. FIFRA preempts respondents' claims because, in several respects, those claims clearly rest on state-law requirements for labeling "in addition to or different from" those established by FIFRA and its implementing regulations. 7 U.S.C. § 136v(b).

First, EPA regulations permit manufacturers to limit the use of their products through subset labeling. 40 C.F.R. § 152.130(b). Federal regulations thus explicitly authorized BASF to *register* Poast Plus with the EPA for a broad range of uses while declining to *label* Poast Plus for those uses. But that labeling decision is precisely the conduct that the courts below punished as "unconscionable" under state law. FIFRA therefore expressly preempts respondents' claim, because it "would impose a labeling requirement that diverges from those set out in FIFRA and its implementing regulations." *Bates*, 544 U.S. at 452. Despite this Court's direction on remand, the Minnesota court refused to apply this holding.

Second, respondents' claims directly conflict with EPA regulations that require manufacturers to label pesticides as

[4] It is sophistry to declare that "the farmers' claims do not challenge the legality of BASF's subset labeling, but rather its misrepresentations about the products, their registration, and their capacities." App., *infra*, 17a. The very evidence on which the court below based its ruling belies that assertion. The court did not rely only, or even principally, on statements by BASF that respondents claimed were false. Instead, it focused on undisputedly *truthful* speech that tended to discourage the illegal off-label use of Poast Plus: the "magazine article discussing increased enforcement of fines for failing to follow label recommendations" (*id.* at 16a) and the reports to "authorities that farmers were using Poast Plus on minor crops." *Id.* at 74a. Claims like those advanced by respondents accordingly cannot be divorced from the underlying challenge to conduct expressly authorized by FIFRA and its implementing EPA regulations.

different products if their ingredients differ to a specified degree. Respondents contended repeatedly that BASF's deceptive acts included "advertis[ing] and market[ing] * * * equivalent formulations * * * as two separate products under two separate brand names and two separate prices." Cmplt. ¶ 2; see also Tr. 2528 (BASF "marketed and sold one product as two different products to exploit a segment of the market"); Motions Hearing Tr. 25 (Oct. 6, 1998) (BASF wrongfully "distinguish[ed] equivalent products on the bas[is] of a label that is false and misleading"); Tr. 572, 1403–1404, 1450, 2176. At the same time, respondents successfully opposed instructions that would have informed the jury that EPA regulations *required* BASF to register and label Poast and Poast Plus as different products with different names. See Tr. 3645–3646. The decision below clearly imposes a state law labeling rule that differs from these regulations, again disregarding this Court's ruling in *Bates*.

Third, FIFRA preempts respondents' state law claims because they challenge the accuracy of pesticide labels that, as respondents acknowledge, were approved by the EPA and satisfy federal standards. "[A] manufacturer should not be held liable under a state labeling requirement subject to § 136v(b) unless the manufacturer also is liable for misbranding as defined by FIFRA." *Bates*, 544 U.S. at 454. As we have shown, respondents presented (over objection) voluminous evidence at trial purporting to establish that BASF's labels were "deceptive." See pages 6–8, *supra*. Although respondents now assert that their theory of liability rests on the claim of "unconscionable" nonlabel conduct, that assertion ignores the evidence that respondents *actually* used to prove their case. As a practical matter, FIFRA's preemption provision would be meaningless if, as here, plaintiffs could present extensive argument and testimony challenging a manufacturer's adherence to EPA labeling requirements under the guise of establishing that the manufacturer's marketing practices failed an amorphous standard of "unconscionability."

Despite this Court's holding in *Bates*, the state court decision endorses just that practice.

Fourth, respondents' state law claims conflict with the federal regulatory scheme by imposing liability on BASF for failing to publicize the full extent of the EPA's registration of Poast Plus in non-label communications. Under FIFRA, the *label*, not the federal registration, controls how consumers may use pesticides, and FIFRA expressly bars manufacturers from promoting illegal off-label pesticide use. See 7 U.S.C. § 136j(a)(1)(B). The EPA made clear in this very case that "the label is the law" by refusing to grant an enforcement waiver allowing North Dakota farmers to use Poast Plus off-label for minor crops, despite the product's federal registration for such crops. D. Ex. 636. See *id.* at 2 (EPA officials explained that allowing use of Poast Plus on minor crops would "cause confusion in the regulated marketplace, and, in effect, [encourage] pesticide misuse"). If state law forced BASF to declare that (despite limits in the federally approved label) it had secured EPA registration of Poast Plus for minor crops, that declaration likewise would have undermined the regulatory scheme by encouraging farmers to experiment with uses of the pesticide that were *not* covered by the label's directions. This is not a theoretical problem; respondents' counsel contended in closing argument that this is precisely what plaintiffs intended to do. See Tr. 3772 ("[The magazine article] was part of a unconscionable commercial practice to scare the farmer into not experimenting with Poast Plus").

Finally, the decision below conflicts with substantive FIFRA requirements because it strips away an option provided by federal law. Manufacturer control over and responsibility for the use of pesticides is inherent in FIFRA's basic structure, under which the manufacturer decides both which crops to include in any application to register a pesticide with the EPA and whether to seek approval for use of a pesticide by particular states. The Court in *Bates* made clear that, even after EPA registration, manufacturers have a "continuing obli-

gation" to "use the utmost care in the business of distributing inherently dangerous items." 544 U.S. at 438, 450. It is fundamental that a state cannot impose liability on individuals for doing what a federal law or regulation "authorized them to do." *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981). See also *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 881–882 (2000); *Fidelity Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 156 (1982). Here, however, the Minnesota courts imposed liability on BASF for doing what federal law plainly allowed: seeking and obtaining a broad registration for Poast Plus from the EPA but deciding not to seek state registration or to label that pesticide for use on minor crops — and opting instead to market only the safer (and more extensively tested) Poast for those high-risk uses.

3. The Decision Below Is One Of Great Practical Importance. The Minnesota Supreme Court's decision poses a serious threat to this country's system of pesticide regulation. Most immediately, the decision will make it risky for manufacturers to follow the EPA's subset labeling regulation. As *Bates* itself makes clear, the fact that the EPA has registered a pesticide for use on a particular crop does not mean that the product can be safely used under all geographic, climactic and soil conditions and in combination with all other products. Thus, even after a manufacturer has obtained EPA registration of a product for a particular use, it is often necessary for the manufacturer to delay (or not undertake at all) the further step of registering (and then labeling) the product for that use in all states. That is undoubtedly why, when farmers began to complain about BASF's use of subset labeling in 1997, the head of the EPA's pesticide division stated publicly that the targeted practices were "perfectly legal." John MacDonald, *Farmers Win Fight With Pesticide Company*, THE BISMARCK TRIBUNE, May 18, 1997, at 8A; see also *ibid.* (EPA official Don Stubbs states that "there's nothing illegal about [these practices] in any way").

Under the Minnesota Supreme Court's ruling, however, a manufacturer's decision not to seek state registration for an EPA-registered use (and to discourage off-label use of the product) may be grounds for an award of treble damages under state law. To avoid the risk of massive liability under this regime, manufacturers will be forced either to rush their EPA-registered pesticides to market for all uses without state-specific testing, or to delay registration of new pesticides, or to protect themselves by flooding the marketplace with data about EPA-registered uses that have not been approved by the states or included on product labeling. This will confuse consumers, promote the illegal off-label use of pesticides, and undermine EPA's policy that "the label is the law" — conflicting with FIFRA's purposes and creating unnecessary risk to crops.

The decision below also will frustrate the cooperative federal/state "regulatory partnership" that FIFRA establishes. *Mortier*, 501 U.S. at 615. In *Bates*, this Court emphasized that FIFRA "authorizes a relatively decentralized scheme that preserves a broad role for state regulation." 544 U.S. at 450. Yet the Minnesota Supreme Court has upheld a $52 million judgment against BASF because it chose not to sell Poast Plus for use on all 60 minor crops in all 50 states – even though no state had authorized such use and California had affirmatively refused BASF's application to register Poast Plus for *any* use. See n.1, *supra*. Unless corrected, the decision inevitably will frustrate the states' authority over pesticide use by forcing manufacturers to publicize EPA registrations whether or not comparable state registrations have been secured or use of the pesticide would be legal.

More generally, by allowing plaintiffs to use claims of "unconscionable marketing practices" to challenge product labels, the decision below makes it impossible for manufacturers to rely on the labeling rules established by the EPA under FIFRA. Instead, they will have to guess at the conduct for which they might be found liable under *post hoc* applica-

tion of amorphous state consumer fraud laws. Given the growing willingness of state courts to apply one state's law in class actions challenging nationwide conduct (see generally Barry A. Weprin, *Plaintiffs' Perspective on Recent Developments in Class Certification of Sales Practice Claims: The Focus Shifts to State Consumer Statutes*, SH084 A.L.I.-A.B.A. 273, 281–292 (May 2003)) and the prevalence of opaque state consumer fraud statutes, the resulting confusion will be felt across the country unless this Court intervenes.

B. The Decision Below Departed From *Bates* In Denying BASF A Jury Instruction On FIFRA's Labeling Requirements

The Minnesota Supreme Court also erred in holding that BASF was not entitled to a jury instruction regarding the requirements of FIFRA's labeling rules. To avoid the danger that state liability requirements depart from the federal FIFRA standards, this Court emphasized in *Bates* that "a court *should* instruct the jury on the relevant FIFRA misbranding standards, as well as on any regulations that add content to those standards." 544 U.S. at 454 (emphasis added). The Minnesota Supreme Court nevertheless refused to require such an instruction, reasoning that *Bates* is inapplicable here because this case does "not involve claims of deceptive labeling, but rather deceptive nonlabel conduct." App., *infra*, 23a. That rationale for denying BASF a FIFRA jury instruction is flatly inconsistent with *Bates*, creates a regime that will frustrate important FIFRA policies, and makes uniformity in the administration of FIFRA impossible.

First, even if one assumes that respondents' ultimate theory of liability is consistent with FIFRA, much of the evidence and argument presented to the jury plainly was not. As we note above, respondents repeatedly urged the jury to find that it was "unfair, unethical, and immoral" for BASF not to label Poast Plus for use on minor crops — despite the fact that federal regulations expressly authorized precisely that conduct. See pages 6–8, *supra*. In light of the pervasive pres-

entation of such evidence, jury confusion regarding BASF's labeling obligations under federal law was inevitable. The approach taken by the court below thus allows plaintiffs in cases implicating FIFRA to evade *Bates* by the simple expedient of offering evidence and argument that target product labels, while purporting to premise their legal claims on "deceptive nonlabel conduct."

Second, as explained above, respondents' claims in this case necessarily challenged BASF's subset labeling. See pages 14–16, *supra*. Absent clear instructions that FIFRA and EPA regulations *required* BASF to register Poast and Poast Plus as different products, *permitted* BASF to label Poast Plus for fewer crops than were registered by the EPA, and *prohibited* the use of Poast Plus on crops for which it was not labeled, there is every reason to believe that the jury held BASF liable for engaging in conduct that is mandated or authorized by federal law. Indeed, respondents' counsel argued in closing that the omission of any instructions about the EPA regulations meant that the jury could disregard them entirely. Tr. 3748. Contrary to *Bates*, the trial court's instructions did nothing to ensure that the state standards actually applied by the jury and the federal standards that should have controlled were "*genuinely* equivalent." 544 U.S. at 454 (emphasis in original).

The record in this case graphically illustrates the validity of this Court's insight in *Bates* that jury instructions "on the relevant FIFRA misbranding standards" are necessary to ensure that juries do not depart from federal requirements. *Ibid.*[5] BASF requested that the jury be instructed, among other things, that EPA regulations required BASF to register Poast and Poast Plus as different products and to market

[5] The state court was wrong in suggesting that jury instructions were unnecessary because "BASF's counsel argued extensively in closing about FIFRA, state registration, and their relevance to the case." App., *infra*, 23a. It is well-established that "arguments of counsel cannot substitute for instructions by the court." *Taylor* v. *Kentucky*, 436 U.S. 478, 489 (1978).

them under different names; "'[t]hat EPA allows a company to label an herbicide for fewer crops than registered by the EPA'"; "'[t]hat [a] manufacturer of pesticides has no duty under federal or state law to label pesticides for specific crop uses'"; and "[t]hat the jury could not find '[t]he omission of any information from, or the inclusion of any information on' the Poast Plus label to be a violation of the NJCFA." App., *infra*, 21a. In a case where the jury was bombarded with evidence concerning the supposed "deceptiveness" of BASF's labels and where respondents premised liability on the theory that subset labeling is unconscionable, the requested instructions would have forestalled a verdict that substantially undermines FIFRA policies. The Minnesota Supreme Court's refusal to require such an instruction conflicts directly with *Bates* and should be set aside.[6]

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[6] The state court's suggestion that BASF waived the jury instruction issue by failing to include it in its pre-*Bates* petition for review should not prevent this Court from reaching this issue. As part of its FIFRA preemption argument, BASF challenged the trial court's failure to instruct the jury about BASF's rights and obligations under federal law at every step in this appeal. See, *e.g.*, BASF's Brief to the Minn Sup. Ct. at 56, 60 n.15. In addition, as framed by the state court, the waiver issue is not "independent" but rather depends on, and is interwoven with, an analysis of federal law. The court below concluded that "BASF is not permitted to resurrect these waived arguments because of a change in the law by the Supreme Court in *Bates*," opining that "[n]othing the Supreme Court said in *Bates* created new law that made these [jury instruction] arguments newly-available." App., *infra*, 20a. Because the decision as to waiver thus relies in part on an analysis of *Bates* and FIFRA preemption, it was *not* independent of federal law and does not deprive this Court of jurisdiction. See, *e.g.*, *Ake* v. *Oklahoma*, 470 U.S. 68, 75 (1985). Moreover, *Bates did* break new ground; the Court had not before recognized a federal-law entitlement to jury instructions regarding FIFRA's requirements in state law actions involving a preemption defense. In such circumstances, a lower court on remand may not decline to address the defendant's right to such an instruction. See *Bates*, 544 U.S. at 453 n.27 ("Since Dow did not have the benefit of our construction of [FIFRA] [during prior lower-court proceedings], Dow should be allowed to address those matters on remand.").

II. THE DECISION BELOW PENALIZES TRUTHFUL SPEECH AND THEREFORE CANNOT BE RECONCILED WITH THE FIRST AMENDMENT

The First Amendment aspect of the decision below also warrants review. The Minnesota courts held that truthful speech on matters of public concern may constitute an "unconscionable" practice that gives rise to liability under state law. That holding, which runs afoul of fundamental First Amendment principles, inevitably will "chill a speaker's efforts to engage in public debate." *Nike, Inc.* v. *Kasky*, 539 U.S. 654, 680 (2003) (Breyer, J., dissenting). For this reason, the decision below raises many of the same concerns that the Court considered but declined to resolve several years ago in *Nike*. Like the California statute at issue in *Nike*, Minnesota's application of the New Jersey consumer protection law imposes liability for engaging in speech without providing any of the protections traditionally thought necessary to safeguard participants in public debate. The validity of this holding involves recurring issues of tremendous importance.

A. The Decision Below Holds That Petitioner's Truthful Speech Was "Unconscionable"

Respondents' claim of "unconscionable commercial conduct" relied on BASF's *truthful* statements on subjects of *public* concern. As noted above, respondents premised liability on two such statements that are entitled to full First Amendment protection. The first was an article, submitted by petitioner's public relations firm and published in *Sugarbeet Grower* magazine, "which discussed the illegality of off-label use of pesticides and increased enforcement of penalties for not following the recommendations on pesticide labels." App., *infra*, 60a. Respondents acknowledged that the statements in this article — which did not mention Poast or Poast Plus (or any BASF product) — were entirely accurate (see Tr. 3773) and addressed "significant matters of public concern." Pl. Cons. Mem. in Opp. to BASF's Mot. in Limine, at 61.

Respondents also relied on a BASF employee's report to North Dakota authorities of substantial sales of Poast Plus to retailers in areas of the State where few Poast Plus-labeled crops were grown. See App., *infra*, 59a, 74a. Again, it is undisputed that the report was accurate. Indeed, in response, North Dakota authorities investigated and commenced *successful* enforcement actions against dealers and farmers for illegal off-label use of Poast Plus (see *id.* at 29a, 32a).

Respondents took the position that these two instances of truthful speech were "unconscionable" under the NJCFA because they represented an "attempt[] to prevent word from spreading that Poast Plus was registered for use on minor crops." App., *infra.*, 74a. As respondents' counsel put it in their closing argument, the *Sugarbeet Grower* article was "good information but done for the wrong purpose." Tr. 3773. The courts below accepted that theory of liability, identifying the article and the report to North Dakota agriculture authorities as essential components of "the farmers' claims of unconscionable commercial conduct." App., *infra*, 74a; see also *id.* at 46a–47a. In doing so, the Minnesota Court of Appeals held that the First Amendment does not protect BASF's speech because "there is no claim that the reports that BASF seeks to protect were defamatory or that prior restraint was at issue" and because "[t]his consumer fraud action * * * does not raise a libel claim." *Id* at 47a.

B. The Decision Below Conflicts With This Court's First Amendment Rulings

The court of appeals' ruling cannot be reconciled with this Court's settled doctrine for several reasons. First, the state court evidenced a shocking indifference to this Court's decisions when it concluded that the First Amendment imposes no limit on the use of speech to establish liability so long as the case does not involve defamation, libel, or a prior restraint. Whatever the context in which a claim arises, it is fundamental that "the presence of activity protected by the First Amendment imposes restraints on the grounds that may

give rise to damages liability and on the persons who may be held accountable for those damages." *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 916–917 (1982). Innumerable decisions of this Court, involving circumstances *outside* of the context of libel and prior restraint, have invalidated state attempts to restrict or punish speech. See, *e.g.*, *Harte-Hanks Commc'ns, Inc.* v. *Connaughton*, 491 U.S. 657, 685 n.33 (1989) (listing examples); *Hustler Magazine* v. *Falwell*, 485 U.S. 46, 56 (1988); *Street* v. *New York*, 394 U.S. 576, 590 (1969); *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967). The judgment below is flatly inconsistent with this principle.

It also conflicts with the decisions of federal courts of appeals and state courts of last resort, which have followed this Court's lead and held that accurate statements may not be used as a basis for liability under unfair business practices regimes. See, *e.g.*, *Jefferson County School Dist. No. R-1* v. *Moody's Investor's Servs., Inc.*, 175 F.3d 848, 857 (10th Cir. 1999) ("[l]ower federal courts have * * * reject[ed] a variety of tort claims based on speech protected by the First Amendment"); *Unelko Corp.* v. *Rooney*, 912 F.2d 1049, 1058 (9th Cir. 1990) (tortious interference and trade libel claims "are subject to the same first amendment requirements that govern actions for defamation").

Second, in failing to accord First Amendment protections to reports delivered to government officials, the Minnesota courts disregarded a long line of this Court's decisions recognizing that the right "to petition the Government for a redress of grievances" (as in reporting possible illegal conduct) is "an assurance of a particular freedom of expression." *McDonald* v. *Smith*, 472 U.S. 479, 482 (1985). The Court has explained that the principles animating the right to petition make it impermissible for the state to punish those who undertake "to influence public officials" — regardless of the petitioning person's "intent or purpose." *United Mine Workers of Am.* v. *Pennington*, 381 U.S. 657, 669–670 (1965). See, *e.g.*, *Prof'l Real Estate Investors, Inc.* v. *Columbia Pic-*

tures Indus., Inc., 508 U.S. 49, 56–57 (1993); *Eastern R.R. Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).[7] Thus, for example, "efforts to influence public officials" cannot be made unlawful "even though intended to eliminate competition." *Pennington*, 381 U.S. at 670.

Third, "state action to punish the publication of *truthful* information seldom can satisfy constitutional standards." *Smith* v. *Daily Mail Publ'g Co.*, 443 U.S. 97, 102 (1979) (emphasis added). The Court has held repeatedly that speech on matters of public concern may not give rise to liability absent a showing of falsity. See, *e.g.*, *Hustler Magazine*, 485 U.S. at 56; *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 775–776 (1986); *Garrison* v. *Louisiana*, 379 U.S. 64, 73–74 (1964). That is so even when the speech is the product of a "bad motive" (*Hustler Magazine*, 485 U.S. at 53), or when the speaker acted out of "hatred or ill will" (*ibid.*), or even when the statement is made with "actual malice." *Garrison*, 379 U.S. at 78. Indeed, most of the Court's decisions in this area were designed to ensure that claims of falsity do not squeeze out the "breathing space" needed to encourage truthful speech on matters of public concern. See, *e.g.*, *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974); *New York Times-Co.* v. *Sullivan*, 376 U.S. 254, 272 (1964). See also *Illinois ex rel. Madigan* v. *Telemarketing Assocs., Inc.*, 538 U.S. 600, 602 (2003) ("[e]xacting proof requirements" are necessary "to provide sufficient breathing room for protected speech"). Where, as here, the speech undisputedly *is* truthful, liability is presumptively improper.

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[7] Although the *Noerr-Pennington* doctrine initially was articulated in cases construing the Sherman Act, both this Court and the federal courts of appeals have since held that the right to petition precludes the imposition of liability for addressing the government "in other contexts." *Prof'l Real Estate Investors*, 508 U.S. at 59 (citing cases). See, *e.g.*, *BE & K Constr. Co.* v. *NLRB*, 536 U.S. 516, 528-533 (2002); *Claiborne Hardware*, 458 U.S. at 913-914; *Cardtoons, L.C.* v. *Major League Baseball Players Ass'n*, 208 F.3d 885, 889-890 (10th Cir. 2000) (en banc).

Of course, regulations suppressing or punishing truthful speech may be permissible in extraordinary circumstances. See, *e.g.*, *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697 (1931) (publicizing military plans in time of war). But such regulations may be sustained only on a showing that they are necessary "to further a state interest of the highest order." *Daily Mail Publ'g*, 443 U.S. at 103. The courts below did not ask for, and respondents could not possibly make, such a showing in this case. "Simply labeling an action one for 'fraud,' of course, will not carry the day." *Telemarketing Assocs.*, 538 U.S. at 617. But that characterization was all that the courts below found necessary to reject the First Amendment argument here. See App., *infra*, 46a–47a (challenged evidence was admissible because it "was used to support the farmers' claim of consumer fraud").

C. The Decision Below Will Chill Speech

The constitutional error committed by the courts below is an egregious and inexplicable one that, if not corrected, will have serious consequences closely akin to those identified by five Members of the Court in *Nike*. Although the New Jersey statute invoked by respondents in this case is not identical to the California law at issue in *Nike*, the statutes share significant characteristics: both are extraordinarily broad and frustratingly vague. The NJCFA hinges liability on proof of an "unconscionable commercial practice," which means, in essence, anything that a jury finds distasteful. That is not an exaggeration: as the court below itself observed, "'[u]nconscionable commercial practice' in this context is an amorphous concept obviously designed to establish a broad business ethic." App., *infra*, 77a (citations and quotation marks omitted). Moreover, as the court below also acknowledged, the New Jersey statute "provides that an offense arises 'whether or not any person has in fact been misled, deceived or damaged thereby.' N.J. Stat. Ann. 56:8-2. Consumer fraud in New Jersey, in contrast with common law fraud, does not require a showing of reliance, merely a causal relationship.'"

Id. at 23a (quotation marks omitted). And for certain types of "unconscionable" conduct, "'[i]ntent is not an essential element.'" *Id.* at 34a (*quoting Cox* v. *Sears Roebuck Co.*, 647 A.2d 454, 462 (N.J. 1994)).[8]

For the reasons articulated by Justice Breyer in *Nike*, "[i]f permitted to stand, the state court's decision may well 'chill' the exercise of free speech rights." 539 U.S. at 682 (Breyer, J., dissenting). The avowedly vague nature of New Jersey's liability standard makes it impossible for commercial actors to be confident that their truthful speech will not later be deemed by a jury to violate a "broad business ethic." And that danger is further compounded by the considerations identified by the United States in its brief supporting reversal in *Nike*. The government noted that elimination of the traditional requirements of reliance and actual deception "may deter commercial speakers from addressing the very issues of public concern about which they may be most knowledgeable, despite the fact that the speakers believe their statements 'to be true' and even though the statements are 'in fact true.'" Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Nike, Inc.* v. *Kasky*, 539 U.S. 654 (2003) (No. 02-575), 2003 WL 899100, at *12, *25. This is an untenable result: as Justice Stevens observed in *Nike*, "[k]nowledgeable persons should be free to participate in such debate without

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[8] The California consumer protection law at issue in *Nike* shared many of these characteristics. See *Nike*, 539 U.S. at 679-680 (Breyer, J., dissenting). The principal distinction between the two laws is that California's allowed suits by persons who have suffered no injury (see *id.* at 679), while New Jersey's requires an undefined "causal relationship" between the defendant's act and an injury to the plaintiff. But as construed by the Minnesota Supreme Court in this case, the NJCFA requires no showing that anyone relied on the "unconscionable" statement or was in fact misled by it. Under respondents' sweeping fraud theory, therefore, *all* purchasers of Poast during the class period could sue; respondents did not even try to show that any of the named plaintiffs themselves were aware of the *Sugarbeet Grower* article or the report to North Dakota authorities.

fear of unfair reprisal. The interest in protecting such participants from the chilling effect of the prospect of expensive litigation is therefore * * * a matter of great importance." *Nike*, 539 U.S. at 664 (Stevens, J., concurring).

The holdings below can be expected to have a widespread adverse effect on speech. Many state consumer protection statutes are written in broad and vague terms. See generally John S. Kiernan, *et al., Developments in Consumer Fraud Class Action Law*, 537 PLI/Pat 237, 278–283 (1998). The availability of national class actions means that the New Jersey statute at issue here may itself be invoked anywhere in the Nation. In these circumstances, "refusal immediately to review the state-court decision * * * will 'seriously erode' the federal constitutional policy in favor of free speech." *Nike*, 539 U.S. at 681 (Breyer, J., dissenting). If the decision in this case awarding trebled "damages" of more than $50 million is permitted to stand, "both [BASF] and other potential speakers, out of reasonable caution or even an excess of caution, may censor their own expression well beyond what the law may constitutionally demand. * * * That is what a 'chilling effect' means. It is present here." *Id.* at 683.

In fact, the decisions below present both a better vehicle for review and a more pernicious holding than did the state-court ruling in *Nike*. Serious finality and standing concerns in *Nike* led the Court to dismiss the writ of certiorari in that case as improvidently granted. See 539 U.S. at 658–663 (Stevens, J., concurring). The present case has no such impediments to review. And *Nike* involved a decision imposing liability on speech that assertedly was false (see *id.* at 663–665); here, the speech giving rise to liability concededly is *truthful*. If, notwithstanding the First Amendment, such speech may be made the basis for liability and treble damages under state law, it should be this Court that says so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2006

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APPENDIX

STATE OF MINNESOTA

IN SUPREME COURT

C3-02-857

Court of Appeals

Anderson, Russell A., C.J.
Took no part, Page, Anderson, G. Barry, and Gildea, JJ.

Bloomquist, Acting J.[1]

Ronald Peterson, et al.,

Respondents,

vs.

BASF Corporation, a foreign corporation,

Appellant.

Filed: March 30, 2006
Office of Appellate Courts

SYLLABUS

1. Respondents' claims under the New Jersey Consumer Fraud Act are not preempted by the Federal Insecticide, Fungicide, and Rodenticide Act, because they concern non-label deceptive statements and conduct and do not constitute a requirement for labeling or packaging.

2. BASF's arguments concerning improper admission of evidence and refusal to give jury instructions were procedurally waived, and in any event, the district court did not

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[1] Appointed pursuant to Minn. Const. art. VI, §§ 2, 10, and Minn. Stat. § 2.724, subds. 1, 2 (2004).

abuse its discretion in admitting the challenged evidence or in refusing to give the requested jury instructions.

Affirmed.

Heard, considered, and decided by the court en banc.

OPINION

ANDERSON, Russell A., Chief Justice.

In February 2004, we affirmed the judgment for respondents Ronald Peterson, et al., in this class action against appellant BASF Corporation for violation of the New Jersey Consumer Fraud Act ("NJCFA"), N.J. Stat. Ann. §§ 56.8-1 to -106 (West 2001), in BASF's marketing and advertising of its herbicides Poast and Poast Plus. *Peterson v. BASF Corp.*, 675 N.W.2d 57 (Minn. 2004) (*"Peterson III"*). BASF petitioned the United States Supreme Court for a writ of certiorari. In an order filed May 2, 2005, the Court granted the writ of certiorari, vacated the judgment, and remanded for reconsideration in light of *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 125 S. Ct. 1788 (2005), a recently-decided case on preemption under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y (2000). *BASF Corp. v. Peterson*, 125 S. Ct. 1968 (Mem.) (2005). *Bates* confirms our earlier conclusion that the respondents' claims are not preempted by FIFRA, and we therefore affirm the court of appeals.

The facts and procedural history of this case are explained in our initial decision, 675 N.W.2d at 61-65, and need not be recounted in detail here. BASF is a corporation that develops, produces, and markets herbicides. Respondents ("farmers") are a nationwide class of farmers[2] who alleged that BASF violated the NJCFA by deceptively

[2] The class does not include farmers from North Dakota who participated in a separate class action against BASF that was settled.

advertising and marketing two BASF herbicides, Poast and Poast Plus. Evidence introduced at trial established that the two products, when applied according to label instructions, contain the same amount of the same active ingredient per acre.[3] Both products were registered with the Environmental Protection Agency ("EPA") under FIFRA for use on the same crops, including both major crops and minor crops.[4] Nevertheless, pursuant to a marketing strategy to maximize profits based on the different economics of the major and minor crop herbicide markets, BASF did not register Poast Plus with state regulators for use on most minor crops and its label did not indicate it was suitable for use on minor crops.[5]

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[3] Poast Plus contains 13% sethoxydim, while Poast contains 18%. However, when mixed and used according to the directions, they both have a gallons-to-acres covered ratio of 0.19%. In other words, they provide the same amount of active ingredient per acre when correctly applied. Poast Plus also contains an "adjuvant" (an ingredient that modifies the action of the principal ingredient). But in order to use Poast, farmers must add an adjuvant. In fact, when registering Poast Plus with the FDA as safe for use on minor crops, BASF claimed that no further study of Poast Plus's effects on minor crops was needed because "the proposed label directions for use in the above listed crops for Poast Plus are identical to those for the registered product Poast Herbicide."

[4] "Major" crops include such crops as soybeans, peanuts, cotton, and corn, which are grown in huge quantities for low prices. "Minor" crops, such as sugarbeets, vegetables, and fruits are grown on fewer acres but bring a much higher profit per acre.

[5] There are few herbicides that can be used on minor crops, which means there is little price competition in that area. In contrast, the herbicide market for major crops is competitive. BASF's goal, as stated in its 1990 marketing plan, was to price Poast Plus low to effectively compete with other major crop herbicides while keeping the price of Poast high to exploit the lack of competition in the minor crop market.

BASF furthered this marketing plan by use of advertising and literature, and other conduct, that BASF's internal documents indicated were intended to prevent farmers from learning that the lower-priced Poast Plus was EPA-registered for minor crops and was the active-ingredient equivalent of Poast.

The farmers brought this class action suit against BASF under the New Jersey Consumer Fraud Act in 1997. The district court certified the class action in 1999. In 2000, the court denied BASF's motion to decertify the class, but granted BASF's motion for summary judgment, concluding that BASF's actions did not violate the NJCFA. On appeal, the Minnesota Court of Appeals reversed the summary judgment, holding that there was a question of fact as to whether BASF had violated the NJCFA. *Peterson v. BASF Corp.*, 618 N.W.2d 821, 825-26 (Minn. App. 2000) (*"Peterson I"*). This court denied BASF's petition for review.

The case proceeded to trial, at the end of which the jury unanimously found by special verdict that BASF had violated the NJCFA. The jury found $15 million in damages to the class members, which was trebled as required by the NJCFA. N.J. Stat. Ann. § 56.8-19 (West 2001). With the addition of attorney fees, available to prevailing plaintiffs under the NJCFA, *id.*, and interest, judgment was entered for the farmers in the amount of $52,058,931.51.

BASF appealed on numerous grounds, including as relevant here federal preemption of the state-law claims, erroneous admission of prejudicial evidence, and improper denial of BASF's requested jury instructions. The court of appeals affirmed. *Peterson v. BASF Corp.*, 657 N.W.2d 853 (Minn. App. 2003) (*"Peterson II"*). BASF petitioned this court for review; the petition included the preemption issue, but did not include any express reference to evidentiary or jury instruction issues. We granted review and affirmed in *Peterson III.*

BASF petitioned the United States Supreme Court for a writ of certiorari. The Court granted the writ, vacated the judgment, and remanded the case to this court for reconsideration in light of a recently-decided FIFRA preemption case, *Bates*, 544 U.S. 431, 125 S. Ct. 1788.[6] *BASF Corp.*, 125 S. Ct. 1968. As *Bates* only involved the issue of FIFRA preemption, we review only the preemption aspect of our decision in *Peterson III*. *See In re Linehan*, 594 N.W.2d 867, 871 (Minn. 1999).

BASF raises two main claims that it contends should be reviewed under *Bates*. First, BASF argues that under the *Bates* analysis the consumer fraud claims that are the foundation of this case are preempted by FIFRA, and therefore the case must be dismissed. In the alternative, BASF argues that even if the claims are not preempted as a matter of law, erroneous rulings regarding evidence and jury instructions mandate a new trial under *Bates*.

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[6] This type of Supreme Court action, granting, vacating, and remanding, is known as a "GVR order." It is not a ruling on the merits.

> [A] GVR order is neither an outright reversal nor an invitation to reverse; it is merely a device that allows a lower court that had rendered its decision without the benefit of an intervening clarification to have an opportunity to reconsider that decision and, if warranted, to revise or correct it. The GVR order itself does not constitute a final determination on the merits; it does not even carry precedential weight.

Gonzalez v. Justices of Mun. Court of Boston, 420 F.3d 5, 7 (1st Cir. 2005) (citation omitted). See also *South Dakota v. United States Dept. of Interior*, 423 F.3d 790, 796 n.5 (8th Cir. 2005) ("A GVR does not compel a particular determination or outcome, but occurs often when an intervening development may affect the outcome of the case.").

I.

The starting point for any preemption analysis is the statute itself, because the touchstone of preemption is Congressional intent. *E.g., Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978). We therefore begin our analysis with a brief summary of FIFRA, which is described in more detail in our initial opinion. *Peterson III*, 675 N.W.2d at 61-62. FIFRA is a federal statute that regulates pesticides.[7] FIFRA requires federal registration of pesticides with the EPA and imposes labeling requirements. 7 U.S.C. §§ 136(p), (q), (ee); 136a(a); 136j(a)(2)(G); 136w(c)(3) (2000); 40 C.F.R. § 156.10 (2005). Under FIFRA, a pesticide may only be distributed or used on a particular crop if: (1) the EPA has registered it for that crop, and (2) the farmer uses the pesticide in conformity with its label. 7 U.S.C. §§ 136(ee), 136a(a). Under FIFRA, even if the EPA registers a pesticide for a given type of crop, the producer need not include that use on the label – it may label for only a "subset" of EPA-approved uses. 40 C.F.R. § 152.130(b) (2005). This is known as "subset labeling."

FIFRA does not establish an exclusively federal regime of pesticide regulation; it expressly reserves some regulatory authority to the states. 7 U.S.C. § 136v(a) (2000) ("A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter."). With regard to labeling, FIFRA declares that states are not allowed to add new and different labeling requirements to the FIFRA standards. 7 U.S.C. § 136v(b) (2000) ("Such State shall not impose or continue in effect

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[7] Under FIFRA, "weed" is included in the definition of "pest" and herbicide therefore is included in the term "pesticide." 7 U.S.C. § 136(t), (u) (2000).

any requirements for labeling or packaging in addition to or different from those required under this subchapter.").

As the Supreme Court remanded specifically for reconsideration in light of its decision in *Bates*, we will review that decision in detail. In *Bates*, Texas peanut farmers ("Texas farmers") sought damages from Dow Agrosciences LLC ("Dow") for injury to their crops caused by application of a Dow pesticide. The pesticide had been registered with the EPA under FIFRA and labeled for use "in all areas where peanuts are grown." *Bates*, 544 U.S. at ___, 125 S. Ct. at 1793. Application of the product not only failed to control weeds, it severely damaged the Texas farmers' peanut crops. *Id.* The Texas farmers alleged that Dow knew or should have known that use of the product on soil with a high Ph level like the Texas farmers' would damage the peanuts, but Dow nevertheless claimed both on the product label and in its equivalent sales pitches that the product could be used in all areas. *Id.* The Texas farmers sued Dow on several legal grounds, including strict liability, negligence, fraud, breach of warranty, and violation of the Texas Deceptive Trade Practices-Consumer Protection Act. *Bates*, 125 S. Ct. at 1793- 94.

The district court held that these claims were preempted by FIFRA. The United States Court of Appeals for the Fifth Circuit affirmed, reading the FIFRA preemption provision, 7 U.S.C. § 136v(b), to preempt any state law claim in which "a judgment against Dow would induce it to alter its product label." *Bates*, 125 S. Ct. at 1793 (quoting *Bates v. Dow*, 332 F.3d 323, 331 (5th Cir. 2003)).

The Supreme Court reversed, rejecting the broad "inducement" test employed by the court of appeals and adopting a more narrow test for FIFRA preemption under section 136v(b). *Bates*, 125 S. Ct. at 1791. The Court initially explained that in an earlier case it had rejected a claim that FIFRA preempted a local ordinance that required a permit for

aerial application of pesticides even though the ordinance imposed requirements not found in FIFRA, because the Court had concluded that "FIFRA was not 'a sufficiently comprehensive statute to justify an inference that Congress had occupied the field to the exclusion of the States.'" Bates, 125 S. Ct. at 1797 (quoting *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 607 (1991)). Rather, the Court had concluded, "[FIFRA] leaves ample room for States and localities to supplement federal efforts * * *." *Id.* (quoting *Mortier*, 501 U.S. at 613).

The Court then turned to the specific preemption language of section 136v(b), which provides: "Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." Interpreting this provision, the Court first explained that it applies only to "requirements" imposed by the state and declared that "[t]he Court of Appeals was therefore quite wrong when it assumed that any event, such as a jury verdict, that might 'induce' a pesticide manufacturer to change its label should be viewed as a requirement." *Bates*, 125 S. Ct. at 1798.[8]

The Court proceeded to delineate the scope of preemption established by section 136v(b) by describing the characteristics a state law requirement must have for preemption to apply:

> For a particular state rule to be pre-empted, it must satisfy two conditions. First it must be a requirement "for *labeling or packaging*"; rules governing

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[8] The Court explained that state common law standards, as well as statutes and regulations, on which liability is based can constitute requirements. *Id.* In *Bates* the Court focused primarily on the Texas common law claims. In contrast, here the claims involve statutory liability under the NJCFA.

> the design of a product, for example, are not preempted. Second, it must impose a labeling or packaging requirement that is *"in addition to or different from* those required under [FIFRA]." A state regulation requiring the word "poison" to appear in red letters, for instance, would not be preempted if an EPA regulation imposed the same requirement.

Bates, 125 S. Ct. at 1798. Thus, the Court established, first, that a state law claim is not preempted under FIFRA unless it imposes a requirement, and, second, that a requirement is not preempted unless it satisfies two factors: it must be a requirement (1) for labeling or packaging, (2) that is in addition to or different from FIFRA requirements.

The Court next applied these factors to the Texas state law claims asserted in *Bates*. First, the Court held that the claims for defective design, defective manufacture, negligent testing, and breach of express warranty were not preempted, because none of the common law rules on which those claims were based "requires that manufacturers label or package their products in any particular way." *Bates*, 125 S. Ct. at 1798. In particular, the Court ruled that the breach of express warranty claim was not a requirement for labeling or packaging even though Dow had placed its express warranty on the pesticide's label. *Id.* at 1798-99. The Court explained that the state common law rule requiring the manufacturer to honor its voluntary contractual warranty commitment did not require the manufacturer to provide a warranty or to say anything in particular in that warranty and therefore was not a requirement for labeling or packaging.[9] *Id.* In this context,

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[9] The Court pointed out further that because the common law warranty claim was not preempted, the Texas farmers' statutory claim was not preempted to the extent it was based on breach of warranty. *Id.* at 1799 n.18.

the Court again rejected the reasoning of the court of appeals that a state claim would be preempted if an adverse ruling would "induce" the manufacturer to change its label. The Court stated:

> In arriving at a different conclusion, the court below reasoned that a finding of liability on these claims would "induce Dow to alter [its] label." 332 F.3d at 332 (footnote omitted). This effects-based test finds no support in the text of § 136v(b), which speaks only of "requirements." *A requirement is a rule of law that must be obeyed; an event, such as a jury verdict, that merely motivates an optional decision is not a requirement.* The proper inquiry calls for an examination of the elements of the common-law duty at issue, see *Cipollone*, 505 U.S., at 524; it does not call for speculation as to whether a jury verdict will prompt the manufacturer to take any particular action (a question, in any event, that will depend on a variety of cost/benefit calculations best left to the manufacturer's accountants).

Id. at 1799 (emphasis added).

The Court viewed the Texas farmers' fraud and negligent-failure-to-warn claims differently. The Court explained that the common law duties underlying those claims *were* requirements for labeling and packaging, because those claims were based on allegations that false statements and inadequate warnings *on the product label* violated the state-imposed standards of conduct. *Id.* at 1799-1800.

But that alone was not enough to establish preemption. The Court then addressed the remaining prong of the FIFRA preemption test, whether the state-law labeling and packaging requirements were "in addition to or different from" FIFRA requirements. The Court emphasized that "a state-law labeling requirement is not pre-empted by § 136v(b) if it is

equivalent to, and fully consistent with, FIFRA's misbranding provisions." *Bates*, 125 S. Ct. at 1800.[10] The Court explained at length the foundation and rationale for this "parallel requirements" reading of section 136v(b). *Bates*, 125 S. Ct. at 1800-03. The Court summarized the limited scope of FIFRA preemption regarding pesticide labeling as follows:

> In sum, under our interpretation, § 136v(b) retains a narrow, but still important, role. In the main, it pre-empts competing state labeling standards--imagine 50 different labeling regimes prescribing the color, font size, and wording of warnings--that would create significant inefficiencies for manufacturers. The provision also pre-empts any statutory or common-law rule that would impose a labeling requirement that diverges from those set out in FIFRA and its implementing regulations. It does not, however, pre-empt any state rules that are fully consistent with federal requirements.

Bates, 125 S. Ct. at 1803 (footnote omitted).

Acknowledging that the parties had not adequately briefed the issue of whether the Texas common law fraud and failure-to-warn claims imposed duties of truth in labeling greater than those imposed by FIFRA, the Court remanded that issue to the court of appeals. In conjunction with that

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[10] The Court explained that FIFRA requires truth in labeling under its provisions that prohibit labels from containing "false or misleading" statements and inadequate instructions or warnings. 7 U.S.C. §§ 136(q)(1)(A), (F), and (G) (2000). Thus, a state requirement that precludes false or deceptive statements about a product can be enforced against label content as long as the state requirement is equivalent in relevant part to these FIFRA requirements. *Bates*, 125 S. Ct. at 1800.

remand to determine if the state and federal labeling requirements were equivalent, the Court explained that in order to "ensure that nominally equivalent labeling requirements are *genuinely* equivalent," if the case went to trial the jury should be instructed on the relevant FIFRA misbranding standards and regulations. *Bates*, 125 S. Ct. at 1804.

It is significant that the Court also made the point that a state requirement applicable to oral statements does not qualify as a requirement for "labeling or packaging" covered by section 136v(b). The Court observed:

> To the extent that petitioners' warranty and fraud claims are based on oral representations made by Dow's agents, they fall outside the text of § 136v(b) for an independent reason. Because FIFRA defines labeling as "all labels and all other written, printed, or graphic matter" that accompany a pesticide, § 136(p)(2), any requirement that applied to a sales agent's *oral* representations would not be a requirement for "labeling or packaging."

Bates, 125 S. Ct. at 1798 n.17. Even the concurrence and dissent echoed this narrow view of the "labeling or packaging requirement" factor, in explaining that "[a] state-law cause of action, even if not specific to labeling, nevertheless imposes a labeling requirement 'in addition to or different from' FIFRA's when it attaches liability to *statements on the label* that do not produce liability under FIFRA." *Bates*, 125 S. Ct. at 1805 (Thomas, J., concurring in part and dissenting in part) (emphasis added).

II.

From our careful reading of *Bates*, we conclude that the United States Supreme Court adopted in that case more narrow standards for finding preemption under FIFRA than we applied in our earlier decision. We stated that the issue was "whether one could reasonably foresee that the manufacturer,

in seeking to avoid liability for the error, would choose to alter the product or label." *Peterson III*, 675 N.W.2d at 71 (*quoting Worm v. Am. Cyanamid Co.*, 5 F.3d 744, 747-48 (4th Cir. 1993)). This was essentially the effects-based test used by the Fifth Circuit in *Bates* that was emphatically rejected as too broad by the Supreme Court. See pp. 8, 10, *supra*. We also cited favorably a federal district court decision addressing FIFRA preemption in the context of a claim under the New Jersey Consumer Fraud Act in which the court ruled that "[w]hen advertising or promotional materials merely repeat information or language contained on the label, claims directed at the advertising necessarily challenge the label itself and are therefore preempted." *Peterson III* at 70 (*quoting Mortellite v. Novartis Crop Protection, Inc.*, 278 F. Supp. 2d 390, 401 (D.N.J. 2003)). In *Bates*, the Supreme Court rejected this approach. Even though, as the Court had observed earlier in the opinion, the oral sales presentations at issue in *Bates* were the equivalent of statements on the product label, 125 S. Ct. at 1793, the Court explained that to the extent the farmers' warranty and fraud claims imposed liability based on oral representations made by sales agents, those claims would not be preempted because they would not be requirements for "labeling or packaging." *Id.* at 1798 n.17. The Court's rejection of the effects-oriented inducement test and its refusal to view regulation of oral statements, even those that mirror label language, as requirements for labeling or packaging, demonstrate that state regulation must be very directly related to labeling and packaging in order to invoke FIFRA preemption.

As in our earlier decision, our conclusion on remand turns on this crucial determinant. That is, FIFRA preemption applies only if the state requirement on which liability is based is directly addressed to labeling or packaging. We concluded initially, and we do so again, that the farmers' claims that BASF engaged in fraud, deception, and uncon-

scionable conduct in violation of the New Jersey Consumer Fraud Act are based on BASF's marketing and advertising actions and not on the content of the product labels.[11]

BASF makes two broad arguments in seeking relief based on Bates. First, BASF contends that the farmers' claims are preempted under FIFRA and BASF is entitled to prevail as a matter of law. Second, BASF argues that at a minimum it is entitled to a new trial based on evidentiary rulings and denial of jury instructions. We address these arguments in turn.

A. *FIFRA Preemption*

BASF's contention that farmers' claims are preempted as a matter of law is based on three sub-arguments. First, BASF contends that the core of the farmers' claims is that BASF impermissibly marketed Poast and Poast Plus as separate products, when they are really one and the same. BASF asserts that as it was required under FIFRA to label Poast and

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[11] The provision of the NJCFA that BASF was found to have violated provides:

> The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice * * *.

N.J. Stat. Ann. § 56.8-2 (West 2001). BASF does not contend every claim brought under this statute would be preempted by FIFRA, so it is necessary to assess the particular claims asserted by the farmers in this case.

Poast Plus separately, the farmers' claims must be preempted because they would impose liability for conduct required by FIFRA. Second, BASF asserts that the farmers claim that BASF's labeling of Poast Plus for fewer crops than it was registered for with the EPA violated the NJCFA. BASF argues that because FIFRA expressly allows manufacturers to "subset" label EPA-registered products, the farmers' claims seek to impose liability for conduct that is expressly allowed by FIFRA labeling regulations, and the farmers' claims are therefore preempted. Third, BASF argues that the farmers' claims would require a manufacturer to market a product in all 50 states and for all crops for which it is EPA-registered, regardless of the manufacturer's concerns that additional testing is needed to assure safe and efficacious use in all areas or on all crops. BASF argues that this aspect of the farmers' claims is contrary to *Bates* because of the Court's acknowledgement in that case of the continued regulatory role of the states and the fact that tort claims are not preempted under FIFRA in order to encourage manufacturers to exercise caution in the labeling of their products.

The salient question for purposes of FIFRA preemption, as made crystal clear in *Bates*, is whether the farmers' claims under the New Jersey Consumer Fraud Act impose a requirement for labeling or packaging that is in addition to or different from FIFRA requirements. The farmers assert that their claims are not based on the content of the product labels, but rather on the deceptive, fraudulent, and unconscionable nonlabel actions of BASF in pursuing its planned marketing strategy to segment the use of Poast and Poast Plus. As we said in our initial decision:

> The court of appeals * * * held that "the farmers' claims were based on BASF's misleading statements and omissions as to the EPA-authorized uses of the products, not on the claims that BASF committed fraud in the labeling or packaging." *Peter-*

> *son II*, 657 N.W.2d at 865. Further, the court of appeals noted that "the farmers here were not asserting that BASF's registration and container labels were false or misleading, * * * [r]ather, the farmers' point was that *even if* BASF's labels were technically accurate, BASF could and did commit consumer fraud by leading farmers to believe that the cheaper Poast Plus could only be used on major crops * * *." *Id.*

Peterson III, 675 N.W.2d at 70.

As before, we believe the farmers and the court of appeals more accurately characterize the nature of the farmers' claims. The farmers presented evidence that BASF advertised Poast Plus as only "registered" for use on four major crops, cotton, soy beans, peanuts, and alfalfa, when it was EPA-registered for numerous minor crops as well. BASF advertised that Poast was the "only" post-emergent grass herbicide registered for use on minor crops, although Poast Plus was also registered for use on minor crops. A BASF executive candidly admitted this was a material omission. Additionally, BASF attempted to prevent word from spreading that Poast Plus was EPA-registered for use on minor crops. BASF had its public relations firm submit for publication a magazine article discussing increased enforcement of fines for failing to follow label recommendations, and BASF falsely told the North Dakota Department of Agriculture that BASF could not add crops that were on the Poast label to the Poast Plus label because the EPA would require it to do further residue testing, which would cost the company millions of dollars.[12] In this case the conduct that violated the New

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[12] In contrast, in seeking registration for Poast Plus for minor crops, BASF had told the EPA, and the EPA agreed, that no additional residue testing was necessary because Poast Plus used the same active ingredient in the same quantity per acre as the already-tested and registered Poast. See n.3, *supra*.

Jersey Consumer Fraud Act was not the labeling or packaging of Poast and Poast Plus, but BASF's deceptive advertising, literature, magazine articles, and misrepresentations to North Dakota authorities. The conduct at issue is analogous to the oral sales representations that the Supreme Court found in *Bates* to be outside the scope of FIFRA preemption, which is narrowly limited to regulation of the label and packaging itself.

Based on the record, we again reject BASF's characterization of the farmers' claims as requiring that the two products be labeled as one. While the farmers might have believed that would have been a more honest approach for BASF to take, that was not the factual or legal basis for their claims. The duty the farmers' claims imposed on BASF was not to register and label Poast and Poast Plus as one product, but rather, having registered and labeled them separately, to refrain from deceptive statements about their EPA registration, their active ingredient composition, and their relative efficacy on major and minor crops.

For the same reasons, we cannot agree with BASF that the farmers' claims seek to impose liability for BASF's choice to use subset labeling, which is allowed under FIFRA. Again, the farmers' claims do not challenge the legality of BASF's subset labeling, but rather its misrepresentations about the products, their registration, and their capacities noted above.

With regard to BASF's third argument, that the farmers' claims would require marketing products in all 50 states and on all crops for which they are EPA-registered, regardless of the manufacturer's concerns for safety and the need for additional testing, we note first that this is a policy-oriented argument that is not founded on the preemption criteria under FIFRA. Moreover, we are compelled to observe that under the facts of this case the argument bears little credibility. BASF assured the EPA that no additional testing was re-

quired for its registration of Poast Plus for minor crops because the results would be the same as those it had submitted in support of its registration of Poast. Furthermore, evidence was submitted that established that the choice in this case to limit state registration and availability of Poast Plus for use on minor crops was a marketing decision intended to maximize profits, not generated by safety concerns.[13]

Regarding BASF's arguments that farmers' claims should be preempted by FIFRA as a matter of law, we note in conclusion that in light of the Supreme Court's clarification of the appropriate FIFRA preemption standards, it has become even more apparent that the debate in this case is not about the correct preemption standard or about the legal standard imposed by application of the New Jersey statute in the context of the farmers' claims. Instead, the fundamental debate is simply about how the farmers' claims are accurately characterized.[14] Because we conclude that the record

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[13] For instance, BASF indicated in its 1990 marketing plan that its goal was to price Poast Plus low to effectively compete with other major crop herbicides while keeping the price of Poast high to exploit the lack of competition in the minor crop market. Additionally, when the North Dakota Commissioner of Agriculture contacted the EPA to inquire about the Poast Plus registration, she was informed that the EPA had already registered Poast Plus for all crops for which Poast was registered (and had done so at BASF's request), and that BASF was not allowing Poast Plus use on minor crops for marketing reasons.

[14] Indeed, in terms of characterizing claims, although BASF avoids presenting them as such, it appears to us that its arguments that the farmers' claims would require BASF to label Poast and Poast Plus as one product and to market it in all states for all crops are in reality "effects-based" arguments. That is, the success of farmers' claims might induce such conduct on the part of BASF. But, as explained above, the Supreme Court soundly rejected the effects-based inducement test for FIFRA preemption in *Bates*.

supports the farmers' characterization of their claims as based on nonlabel conduct, under *Bates* there is no FIFRA preemption.

B. *Evidence and Jury Instruction Rulings*

BASF argues that even if the farmers' claims are not preempted by FIFRA, BASF is nevertheless entitled to a new trial because (a) evidence about the contents of the Poast Plus and Poast labels was introduced at trial, "inviting the jury to hold BASF liable for fraud on the basis of the labeling," and (b) the court refused to instruct the jury regarding FIFRA labeling regulations, which BASF claims is required by *Bates*.

First, the farmers contend correctly that these arguments were procedurally waived by BASF. Although BASF made these arguments to the court of appeals in *Peterson II* and the court rejected them, *see* 657 N.W.2d at 871-73, BASF did not mention either evidentiary rulings or jury instructions in its statement of issues or otherwise in its petition for review to this court from *Peterson II*. We ruled in *Peterson III* that issues must be raised in a petition for review or they are waived. 675 N.W.2d at 66-67; *see also Hapka v. Paquin Farms*, 458 N.W.2d 683, 686 (Minn. 1990). Moreover, the evidentiary issues were not raised in BASF's briefs to this court in *Peterson III*. Jury instructions were not raised as an independent claim of error, but as support for BASF's preemption argument. It is well-established that failure to address an issue in brief constitutes waiver of that issue. *E.g.*, *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982).

Furthermore, these arguments were not automatically preserved as part of BASF's preemption argument. Although BASF ties these arguments to preemption because their resolution in some degree is related to the nature and permissible scope of the farmers' claims and BASF's defenses, these arguments are more accurately viewed as challenges to trial rulings about evidence and jury instructions. They are not

the same as BASF's legal argument that farmers' claims are preempted by FIFRA.

Finally, BASF is not permitted to resurrect these waived arguments because of a change in the law by the Supreme Court in *Bates*. These arguments were available to BASF (and were made by BASF in *Peterson II*) prior to *Bates*. Nothing the Supreme Court said in *Bates* created new law that made these arguments newly-available, particularly in view of the fact that the Court narrowed the test for FIFRA preemption in *Bates*, rather than expanding it.

Even if these arguments were not waived, BASF would not prevail. First, BASF objects to the district court's decision to allow information from the Poast and Poast Plus labels to be introduced at trial. The evidence to which BASF objects includes the names of the products, the percentages of active ingredients in each, the instructions for use, and the approved uses. BASF claims this evidence should have been excluded because it was irrelevant to any nonlabel-based claim and was strongly prejudicial, because it may have permitted the jury to consider whether the label information was deceptive in reaching its verdict.

"The district court has broad discretion in ruling on evidentiary matters and we will not overturn a district court's evidentiary rulings unless appellant shows a clear abuse of discretion * * *." *State v. Steward*, 645 N.W.2d 115, 120 (Minn. 2002). Evidence is considered relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Minn. R. Evid. 403.

The district court admitted the evidence of the chemical composition of Poast and Poast Plus, instructions for their

use, and other label information because it provided background for the evidence of nonlabel conduct that the farmers claimed was deceptive. We conclude that given the significant degree of relevance and the high standard of Minn. R. Evid. 403 (the evidence must be *substantially more prejudicial than probative* before it is excluded), the district court did not abuse its discretion in admitting the evidence.

Next, BASF claims that it is entitled to a new trial because the district court refused to instruct the jury regarding FIFRA regulations, specifically:

- That EPA regulations "required BASF to register Poast and Poast Plus as separate products."
- That "EPA's regulations prohibited BASF from using the exact same name for Poast and Poast Plus."
- That "EPA regulations allow manufacturers to distribute or sell pesticides under labeling bearing any subset of the directions for use approved by the EPA."
- That "EPA allows a company to label an herbicide for fewer crops than registered by the EPA."
- That "[a] manufacturer of pesticides has no duty under federal or state law to label pesticides for specific crop uses."
- That the jury could not find "[t]he omission of any information from, or the inclusion of any information on" the Poast Plus label to be a violation of the NJCFA.
- That every state requires separate registration of pesticides and may deny registration and bar use of the pesticide notwithstanding EPA registration.

BASF argues that the court's refusal to give these instructions violated the Supreme Court's statement in *Bates* that

courts "should instruct the jury on the relevant FIFRA misbranding standards, as well as any regulations that add content to those standards." *Bates*, 125 S. Ct. at 1804.

Given the context of the Court's statement about jury instructions in *Bates*, we do not understand it to require instructions on FIFRA regulations in every case in which FIFRA preemption is raised. As explained above, the Court interpreted two of the Texas farmers' claims in *Bates* to be based on the truth or falsity of the content of the product label. This raised the question whether the legal standard imposed on the label content by the Texas common law claims was equivalent to the misbranding standards in FIFRA, an issue the Court determined had not been adequately briefed. In remanding for a determination on that issue, the Court also addressed the hypothetical scenario of that issue of equivalence of state and federal labeling requirements going to trial. In that context, the Court raised the issue of jury instructions, stating:

> To survive pre-emption, the state-law requirement need not be phrased in the *identical* language as its corresponding FIFRA requirement; indeed, it would be surprising if a common-law requirement used the same phraseology as FIFRA. If a case proceeds to trial, the court's jury instructions must ensure that nominally equivalent labeling requirements are *genuinely* equivalent. If a defendant so requests, a court should instruct the jury on the relevant FIFRA misbranding standards, as well as any regulations that add content to those standards. For a manufacturer should not be held liable *under a state labeling requirement* subject to § 136v(b) unless the manufacturer is also liable for misbranding as defined by FIFRA.

Bates, 125 S. Ct. at 1804 (third emphasis added).

Thus, when liability under state law is alleged to arise based on the content of the label, the court must ensure, through jury instructions if requested, that the defendant is not held liable based on a state standard that is substantively different than the FIFRA misbranding standards. This case, however, did not involve claims of deceptive labeling, but rather deceptive nonlabel conduct.

> Moreover, appellate review of jury instructions is limited:
>
> When determining the adequacy of jury instructions, this court reviews for an abuse of discretion. The district court has considerable latitude in selecting language for jury instructions. Jury instructions are viewed as a whole to determine whether they fairly and adequately explain the law. An instruction is error if it materially misstates the law.

State v. Moore, 699 N.W.2d 733, 736 (Minn. 2005) (internal citations omitted). The district court's decision must be viewed in the context of the case. During the trial, BASF presented extensive expert testimony on the nature of FIFRA and its regulations. Additionally, BASF admits that the farmers never asserted that BASF violated FIFRA. The farmers' closing and opening statements describe and dwell on BASF's advertising misstatements and its false statements to government officials, mentioning labeling and registration only to explain the nature of the marketing scheme. Finally, BASF's attorney argued extensively in closing about FIFRA, state registration, and their relevance to the case. Given this context, the jury had already been informed at length that BASF was compliant with labeling laws and that BASF could not be held liable for its labels. The court did not want to confuse the jury with instructions on labeling law when it was not alleged that BASF had labeled incorrectly. Therefore, the district court refused to include the requested jury instructions.

> As the court of appeals stated in rejecting this argument:
>
> > BASF's proposed instructions do not relate directly to the charge before the jury, which was whether BASF violated the NJCFA. Further, throughout the entire trial, the jury heard numerous discussions of these issues and the various witnesses' descriptions of the effect of the regulations. These topics were more properly the subject of counsel's final argument rather than jury instructions, and the court did not abuse its discretion in denying the request to include these instructions.

Peterson II, 657 N.W. 2d at 871. We agree and conclude that the district court did not abuse its discretion in denying the requested jury instructions.

Affirmed.

PAGE and ANDERSON, G. Barry, JJ., took no part in the consideration or decision of this matter.

GILDEA, J., not having been a member of this court at the time of the argument and submission, took no part in the consideration or decision of this matter.

Court of Appeals of Minnesota.

RONALD PETERSON, ET AL.,
Respondents,

v.

BASF CORPORATION, *a foreign corporation,*
Appellant.

No. C3-02-857.

March 11, 2003.

Considered and decided by HUDSON, Presiding Judge, SCHUMACHER, Judge, and G. BARRY ANDERSON, Judge.

OPINION

HUDSON, Judge.

In this nationwide class action under the New Jersey Consumer Fraud Act, appellant BASF Corporation argues that: (a) it is entitled to judgment notwithstanding the verdict (JNOV) on the jury's determination that it engaged in consumer fraud; (b) it is entitled to JNOV on the verdict for damages as to the years 1992 and 1995-96; (c) it is entitled to a new trial based on errors in jury instructions and the improper admission of evidence; and (d) the district court improperly certified the class. Respondent farmers filed a notice of review challenging district court determinations as to prejudgment interest and moved to strike portions of BASF's brief. Eight amici filed briefs. We affirm and grant the motion to strike in part.

FACTS

Respondents, farmers who purchased the herbicide Poast from New Jersey-based BASF Corporation from 1992 to 1996, brought a class action against BASF under the New Jersey Consumer Fraud Act (NJCFA), N.J. Stat. Ann. § 56:8-

2 (West 2001). The action was based on the claim that BASF had defrauded thousands of American farmers by marketing its herbicide as two separate products, Poast and Poast Plus, for different uses at different prices through a "system of deceit." *Peterson v. BASF Corp.*, 618 N.W.2d 821, 824 (Minn. App. 2000), *review denied* (Minn. Jan. 26, 2001).

Poast and Poast Plus are post-emergence grass herbicides that contain the same active ingredient, sethoxydim. Sethoxydim was invented, patented, and manufactured by Nippon Soda Company of Japan. Nippon licensed the molecule to BASF, which first used it to develop Poast.

BASF began the regulatory process to register Poast with the EPA in the late 1970s and early 1980s. The biggest hurdle to obtaining EPA registration was establishing the acceptable residue tolerance and determining whether the herbicide would leave a residue on the crops or pose a risk in food. BASF complied with these and other requirements and obtained EPA registration for Poast around 1982 for a large number of both major and minor crops.[1]

By 1983, BASF had registered Poast with the individual states, labeled it for use on major crops, and began marketing the product. It proved to be both safe and highly effective in controlling weeds that were grasses. In contrast, earlier herbicides marketed for this purpose were not consistently effective, and the only other alternative, weeding by hand, was expensive. As word spread, both BASF and state agriculture

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[1] "Major crops" such as soybeans, corn, and cotton are farmed on millions of acres of land but provide a relatively low financial return per acre. "Minor crops" include varied crops such as sugarbeets, vegetables, grapes, citrus fruits, and berries that are farmed on far fewer acres but bring farmers a much higher profit per acre.

departments received requests to use Poast on minor crops. BASF decided to enter the minor crop market and conducted additional efficacy and phytotoxicity testing. By about 1985, it began introducing the product into the minor crop market. Because the 1982 EPA registration already included these minor crops, BASF did not need to obtain any additional EPA approval, although it had to obtain state registrations and change the product label.

Meanwhile, BASF had been developing Poast Plus. When using Poast, the farmers had to add crop oil, an adjuvant, to the herbicide to ensure that it spread and penetrated the leaves properly. With Poast Plus, BASF included adjuvants in the solution sold to farmers. In 1992, BASF obtained EPA registration for Poast Plus for the same major and minor crops for which Poast was already registered. Because Poast and Poast Plus contain the same active ingredient – sethoxydim – and are applied at the same rate, the tolerances established for Poast applied to Poast Plus and no new residue testing was required. The Poast and Poast Plus labels registered with the EPA are identical and cover the same major and minor crops. BASF, however, obtained state registrations and labeled Poast Plus for use only on four major crops: soybeans, cotton, peanuts, and alfalfa. Further, it marketed Poast Plus at a lower price than Poast. Thus, minor-crop farmers could only purchase Poast at the higher price, while major-crop farmers could purchase Poast Plus at a lower price.

The farmers' lawsuit was based on the claim that in its marketing, BASF fraudulently concealed and omitted that the less expensive Poast Plus was registered with the EPA for use on the same minor crops as the more expensive Poast. The jury heard extensive testimony on the issue of whether Poast and Poast Plus were the same products or not. BASF introduced evidence that the products had different chemical formulas because they contained different inert ingredients

and that they had different tank-mix capabilities. In addition, witnesses for BASF testified that Poast Plus was "hotter" than Poast, leading to the possibility of increased crop risk and risk of skin irritation. BASF also noted that Poast Plus is separately patented as a unique product, and that because of their chemical differences, the EPA required BASF to register the products separately and give them different names.

The farmers offered evidence that the products are the same: Poast and Poast Plus are EPA-registered for the same major and minor crops; Poast and Poast Plus are based on the same residue data; and Poast and Poast Plus contain the same active ingredient, sethoxydim. The products control the same weed grasses using the same number of applications, pounds of active ingredient per acre, and time of application. The farmers also asserted that BASF used deceptive formulations of the same product, in order to lead the farmers to believe that Poast was more expensive because it contained more sethoxydim, when the products were the same. They also produced testimony explaining or disputing BASF's claims as to the effect of the different inert ingredients and other distinctions between the products.

The jury also heard evidence as to the fraudulent acts and omissions of which the farmers accused BASF. The farmers showed that BASF engaged in an advertising campaign claiming that only Poast was registered with the EPA for minor crops, despite the fact that Poast Plus was EPA-registered for the same minor crops. Other evidence showed that BASF used mailings to food processors and dealers, an article submitted to *The Sugarbeet Grower* magazine, and a position paper emphasizing the dangers of "off-label" use, despite the fact that Poast Plus had been approved for minor crops. In another strategy, BASF turned in its own dealers to the North Dakota agriculture inspectors for selling Poast Plus to minor-crop farmers in violation of state pesticide laws, leading to criminal prosecutions of dealers and farmers. Further, the

farmers introduced evidence to show that BASF personnel lied to the North Dakota Pesticide Control Board to conceal the fact that Poast Plus was EPA-registered for the same crops as Poast. Once the board learned from EPA officials that this was merely a marketing strategy, North Dakota, as well as South Dakota, obtained so-called "rule 24(c)" special local needs registrations with the EPA, allowing their farmers to use Poast F[illegible] minor crops.

The jury returned a verdict finding that BASF violated the NJCFA and that the violations caused ascertainable losses to the farmers in the years 1992 to 1996. The jury awarded damages of $15,000,000. The district court trebled the damages and added prejudgment interest and attorney fees. After denial of posttrial motions, BASF appealed. Respondents filed a notice of review and filed motions to strike portions of BASF's brief with this court.

ISSUES

I. Is BASF entitled to JNOV as to the jury determination that it violated the New Jersey Consumer Fraud Act?

II. Is BASF entitled to JNOV as to damages awarded for 1992 and 1995 to 1996?

III. Is BASF entitled to a new trial based on errors in jury instructions and improper admission of evidence?

IV. Did the district court improperly certify the class?

V. Were the damages readily ascertainable such that prejudgment interest should be awarded as of the date of their accrual and should prejudgment interest be awarded on the trebled damages?

ANALYSIS

I

BASF first contends that it is entitled to JNOV because as a matter of law it did not violate the New Jersey Consumer Fraud Act (NJCFA), N.J. Stat. Ann. 56:8-2 (West 2001). In addressing this claim, we are guided by the standard of review for an order denying JNOV as well as the law-of-the-case doctrine. First, an appellate court will review the evidence in the light most favorable to the verdict. *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998). If the verdict "can be sustained on any reasonable theory of the evidence" the denial of JNOV will be affirmed; it will be set aside only if "the evidence is practically conclusive against" it. *Id.* (citation and quotation omitted). The appellate court "may not weigh the evidence or judge the credibility of the witnesses." *Lamb v. Jordan*, 333 N.W.2d 852, 855 (Minn. 1983) (citation omitted). The grant or denial of a motion for JNOV is a question of law reviewable de novo. *Edgewater Motels, Inc. v. Gatzke*, 277 N.W.2d 11, 14 (Minn. 1979).

The second consideration addresses the fact that this court has already resolved certain issues in an earlier appeal from summary judgment. *Peterson v. BASF Corp.*, 618 N.W.2d 821 (Minn. App. 2000) (*Peterson I*), *review denied* (Minn. Jan. 26, 2001). In such an instance, those issues become "the 'law of the case' and may not be relitigated in the trial court or re-examined in a second appeal." *Sylvester Bros. Dev. Co. v. Great Cent. Ins. Co.*, 503 N.W.2d 793, 795 (Minn. App. 1993) (citations omitted), *review denied* (Minn. Sept. 30, 1993). Issues not resolved in the first appeal may, of course, be considered in the second appeal. *Id.*

Finally, we note that we have considered arguments by amici. We note that an amicus may not raise an issue not addressed by the parties. *Country Joe, Inc. v. City of Eagan*,

560 N.W.2d 681, 687 n.7 (Minn. 1997). To the extent amici do so, we do not consider those arguments.

The NJCFA is aimed "at unlawful sales and advertising practices designed to induce consumers to purchase merchandise or real estate." *Daaleman v. Elizabethtown Gas Co.*, 77 N.J. 267, 390 A.2d 566, 568 (1978) (quoted in *Peterson I*, 618 N.W.2d at 823). It was intended to "give New Jersey one of the strongest consumer protection laws in the nation." *Cox v. Sears Roebuck Co.*, 138 N.J. 2, 647 A.2d 454, 460 (1994) (quotation omitted). The law provides for a private cause of action and authorizes treble damages, attorney fees, and costs. N.J. Stat. Ann. 56:8-19 (West 2001). It is to be construed liberally in favor of the consumer. *Cox*, 647 A.2d at 461.

"The capacity to mislead is the prime ingredient of all types of consumer fraud." *Id.* at 462 (citation omitted). To show a violation of the act, there must be evidence that the person committed an unlawful practice within the meaning of the act. *Id.* There are three general categories of unlawful practices under the act, two of which are relevant here: affirmative acts and knowing omissions. *See id.* (describing the three categories as affirmative acts, knowing omissions, and regulation violations). Such practices may be unlawful "even if no person was in fact misled or deceived thereby." *Id.* (citations omitted); N.J. Stat. Ann. 56:8-2 (West 2001). Affirmative acts include "[t]he act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, [or] misrepresentation." N.J. Stat. Ann. 56:8-2. "[I]ntent is not an essential element [of such an affirmative act] and the plaintiff need not prove that the defendant intended to commit an unlawful act." *Cox*, 647 A.2d at 462 (citation omitted). Knowing omissions include "the knowing concealment, suppression, or omission of any material fact." N.J. Stat. Ann. 56:8-2. Intent is an essential element of this category, requir-

ing proof that the defendant acted knowingly with intent that another rely on such concealment, suppression, or omission. N.J. Stat. Ann. 56:8-2; *Cox*, 647 A.2d at 462.

After showing that an unlawful practice occurred within the meaning of the act, the plaintiff must show that the unlawful consumer fraud caused an ascertainable loss. *Cox*, 647 A.2d at 464-65. Finally, the plaintiff must show that the loss was the result of the unlawful conduct. *Meshinsky v. Nichols Yacht Sales, Inc.*, 110 N.J. 464, 541 A.2d 1063, 1067 (1988).

BASF contends it is entitled to JNOV on three grounds. First, it asserts that it did not violate the NJCFA as a matter of law because it has shown: that Poast and Poast Plus are not identical products; that federal law preempts a private cause of action based on alleged abuse of the pesticide regulations; and that, in any event, it proceeded lawfully. Second, it contends that the farmers' theories of causation fail as a matter of law. Finally, it charges that the farmers failed to establish a causal link between BASF's allegedly unlawful acts and an ascertainable loss. We review these arguments under the very narrow standard of review for JNOV, and we consider as well whether this court has already ruled on these issues in *Peterson I*.

New Jersey Consumer Fraud Act (NJCFA)

We first address BASF's claim that it is entitled to JNOV because as a matter of law it did not violate the NJCFA. It argues that it showed as a matter of law that Poast and Poast Plus are not "identical," citing, among other things, the different chemical formulas and patents of the two products. Consequently, it contends that the farmers' claim that it defrauded them by marketing one herbicide as two different products, Poast and Poast Plus, cannot stand. We must determine whether, under the standard for JNOV, the evidence is conclusive against the verdict or whether it can be sus-

tained on any reasonable theory of the evidence. *See Pouliot*, 582 N.W.2d at 224.

The issue of whether Poast and Poast Plus were the same herbicide was hotly contested throughout the four-week trial and many witnesses, including farmers, BASF executives, experts, and others, testified on the topic. While BASF contends that the evidence shows conclusively that the products were not the same, testimony was introduced to explain or contradict BASF's evidence. For example, BASF contended that the products have different chemical formulas, ingredients, and concentrations of solvent. The farmers' witnesses explained that the products – although seeming to contain different amounts of sethoxydim – deliver the same amount of this active ingredient when applied according to directions. Witnesses also offered different opinions as to the effect of the inert ingredients. Further, the farmers cite the evidence that Poast and Poast Plus are approved by the EPA for the same crops, based on the same residue data. They control the same weed grasses, using the same number of applications, pounds of active ingredient per acre, and time of application.

The jury was presented with conflicting evidence as to whether the products were the same, and the jury was also presented with explanations as to why seeming differences were not significant. Although another fact-finder might have reached a different result, the jury clearly had evidence from which it could conclude that Poast and Poast Plus were the same product, and we will not substitute our judgment for that of the jury.

Preemption

BASF next argues that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136a (2000), under which EPA registration is required, preempts private causes of action based on alleged abuse of pesticide regulations. It

contends that, in any event, it proceeded legally under these provisions.

The farmers moved to strike this claim, contending that this court has already considered and rejected this argument in *Peterson I*. A careful reading of *Peterson I*, however, shows that this court did not explicitly address preemption; therefore, we will do so here. *Peterson I*, 618 N.W.2d at 824.

Pesticides are subject to federal regulation. 7 U.S.C. 136a(a). "[S]tate[s] shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required" by federal law. *Id.* 136v(b) (2000). Common-law tort actions have been interpreted to constitute such forbidden requirements. *Goeb v. Tharaldson*, 615 N.W.2d 800, 817 (Minn. 2000). Consequently, federal courts "uniformly hold that FIFRA preempts claims relating to labeling and packaging of federally-registered pesticides." *Goeb*, 615 N.W.2d at 817 (citations omitted).

BASF cites several recent federal cases that it contends support its claims of preemption. *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 353 (2001) (holding fraud-on-the-agency claims preempted); *Kimmel v. DowElanco*, 275 F.3d 1199, 1206 (9th Cir. 2002) (holding that where allegations of fraud on the EPA and abuse-of-labeling process give rise to party's intentional-interference-with-prospective-business-advantage claim, claim is preempted); *Dahlman Farms, Inc. v. FMC Corp.*, 240 F. Supp. 2d 1012 (D. Minn. 2002) (holding consumer-fraud claims based on label and off-label statements that were essentially the same were preempted).

In *Buckman*, the Supreme Court held that federal law preempts the state law claim where "the existence of these federal enactments is a critical element." 531 U.S. at 353. BASF contends that the farmers' regulator-abuse claims likewise make the federal regulations a "critical element."

But in *Buckman*, the claims existed "solely by virtue of the FDCA disclosure requirements." *Id.* Here, the farmers' claims were based on BASF's misleading statements and omissions as to the EPA-authorized uses of the products, not on claims that BASF committed fraud in the labeling or packaging.

BASF's reliance on *Dahlman Farms* is similarly misplaced. There, Dahlman's corn crop was damaged after he applied defendant's herbicide pursuant to the label instructions and following assurances from the defendant's salesmen that the herbicide was safe for use on seed corn crops. *Id.* at 1014-15. Dahlman sued under Minnesota's consumer fraud statute claiming, among other things, that the defendant committed consumer fraud by making off-label statements in its advertising that misrepresented the efficacy of the product. *Id.* at 1020-21. The trial court held that Dahlman's claims were preempted because the off-label advertising statements concerning the efficacy of the product were essentially the same as the statements on the label itself – both indicated that the product was safe for use on seed corn crops. *Id.*

Dahlman Farms does not further BASF's cause. Again, the farmers here were not asserting that BASF's registration and container labels were false or misleading, which was the heart of the *Dahlman Farms* consumer fraud claim. Rather, the farmers' point was that *even if* BASF's labels were technically accurate, BASF could and did commit consumer fraud by leading farmers to believe that the cheaper Poast Plus could only be used on major crops, when, in fact, it was EPA-registered for both major and minor crops. Consequently, the farmers' claims are not preempted.

Next, BASF notes that federal regulations permit "subset labeling," that is, labeling of a pesticide for fewer than all of the uses for which it is EPA-registered. Thus, BASF contends that its marketing of Poast and Poast Plus cannot be the

basis for the jury's determination of fraud because it was proceeding lawfully under the federal regulations in registering Poast and Poast Plus as different products and in labeling Poast Plus for fewer than all of the crops for which it was registered with the EPA. The farmers move to strike this argument, contending that it was raised and decided by this court in *Peterson I*.

In *Peterson I*, this court specifically addressed the argument and noted that the farmers had presented evidence that the fraud was based not on BASF's lawful use of the regulations but on a plan that it designed "to conceal the fact that Poast Plus was EPA registered for use on minor crops and to discourage any off-label use of Poast Plus." 618 N.W.2d at 824. This court held that there was a genuine issue of material fact as to whether BASF's system of deceit fell within the protection of the NJCFA. *Id.* Thus, the issue has been resolved in the previous litigation and the farmers' motion to strike the argument is granted.

Further, to the extent that BASF challenges the sufficiency of the evidence on this issue, we hold that the jury could conclude that BASF's marketing scheme and exploitation of federal regulations, rather than its lawful use of federal regulations, concealed that Poast and Poast Plus were registered for the same uses and constituted fraud under the NJCFA.

Causation

The next issue concerns causation. "[A] causal relationship must exist between the ascertainable loss and the unlawful practice" to establish a violation under the NJCFA. *Roberts v. Cowgill*, 316 N.J. Super. 33, 719 A.2d 668, 672 (App. Div. 1998). "[O]nce a plaintiff has established a significant relationship" exists, the burden then shifts to the defendant to show that any particular losses do not have the requisite causal connection. *Id.* at 673. Even if the disputed

commercial practice is not inherently deceptive, "[t]he statutory and regulatory scheme is also designed to promote the disclosure of relevant information to enable the consumer to make intelligent decisions in the selection of products and services." *Div. of Consumer Affairs v. Gen. Elec. Co.*, 244 N.J. Super. 349, 582 A.2d 831, 833 (App. Div. 1990).

BASF asserts that the farmers' theory of causation cannot stand as a matter of law. In *Peterson I*, however, this court recognized the basis for the farmers' claim for damages:

> [The farmers] claim that they lost the opportunity to refuse to buy Poast because BASF's marketing scheme and exploitation of federal regulations concealed that Poast Plus was registered for the same uses as Poast. [Farmers'] reactions when they learned of BASF's scheme constitute circumstantial evidence that these farmers would not have stood idly by and paid inflated fees to BASF.

618 N.W.2d at 825. The farmers contend that BASF's argument should be stricken because this court conclusively determined that whether BASF's actions arose to fraud under the NJCFA was a jury question. To the extent that BASF makes the legal argument again in this appeal, the argument is stricken.

BASF also contends that the evidence does not support the verdict as to causation. The evidence will be viewed in the light most favorable to the verdict. *Pouliot*, 582 N.W.2d at 224. This court cannot set aside the verdict "if it can be sustained on any reasonable theory of evidence." *Id.* (citation omitted).

BASF contends that the farmers' argument that they were unfairly induced to buy Poast rather than Poast Plus must rest on their ability to force BASF to offer Poast Plus for minor crop use. It argues that as a matter of law it has the right to choose whether or not to market Poast Plus for minor crops.

While BASF's argument may be true, this argument does not address the claim that BASF engaged in fraud.

Next, BASF contends that Poast Plus was not fully tested on minor crop use, citing testimony from its witnesses that Poast Plus had received only limited crop safety testing on minor crops. There was, however, extensive evidence from which the jury could conclude to the contrary. It was undisputed that when BASF registered Poast Plus with the EPA, no new residue testing data was required because Poast Plus, when applied according to directions, delivered the same amount of sethoxydim that Poast did. Further, the EPA required that companies seeking registration must complete efficacy and crop safety testing, although the companies are not required to submit the data to the EPA. Moreover, evidence showed that Poast Plus was used successfully on minor crops when permitted under North Dakota's and South Dakota's 24I registrations. There was also testimony by one of BASF's witnesses that the herbicide Vantage, an alternative name for Poast Plus, was labeled and marketed for use on fruit trees prior to development of fruit and ornamental and nursery plantings with only very limited testing. There was clearly evidence in the record from which the jury could have concluded that BASF believed Poast Plus had been sufficiently tested for use on minor crops.

Next, BASF asserts that because no state had approved Poast Plus for use on all 60 minor crops, it could not have legally marketed or sold Poast Plus for use on those crops, and farmers could not legally use it. It contends that each state requires its own crop-specific registration and approval of each pesticide before permitting sale or use within its borders. *See, e.g.*, Minn. Stat. 18B.26 (2002) (pesticide registration). BASF asserts that states apply different standards and may refuse to register pesticides for various crops regardless of the EPA registration. Consequently, it contends that the farmers sought to impose on BASF a duty to illegally pro-

mote and sell a pesticide for crops on which it could not legally be used.

Again, however, the farmers presented evidence from which the jury could reach a different conclusion. The farmers' expert testified that once a company obtains an EPA registration, it is "very easy" to obtain a state registration in the majority of the states. The process is generally regarded as a mere formality except in California, Wisconsin, New York, and Florida, unless the product is considered risky. Poast Plus is not considered risky. The expert explained that the states rely on the EPA label to ensure that the product has the proper residue tolerances, safety, and efficacy. For BASF to register Poast Plus for the additional minor crops in most states, he noted that it would merely have to include those crops on the EPA label, send a letter to the state departments of agriculture with a small fee, and ask that the additional crops be included on the state registration.

Next, BASF challenges the farmers' theory that, had the farmers known that Poast and Poast Plus had been registered with the EPA for the same uses, they would have been able to force BASF to lower the price of Poast to a fair price for minor crop use and "would not have stood idly by and paid inflated prices to BASF." BASF first contends that the farmers cannot force it to sell Poast at the price that they want. But this is not what the farmers contended. Instead, the issue here was whether such sales were based on fraud and thus were unlawful.

BASF also contends that the farmers are asserting that they have a right to engineer an illegal, concerted, horizontal boycott to drive down the price of Poast. *See F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (holding that where members of bar association agreed to stop representing indigent criminal defendants until government increased their compensation, this was a per se unlawful restraint of trade). But there was no evidence in this case of

such an illegal "boycott." Instead, the evidence showed that the farmers discussed their individual decisions not to purchase BASF products.

BASF also contends that, assuming the "proposed boycott" was not illegal, New Jersey law does not support the farmers' "right to boycott" or "fraud on the market" theory. But the cases cited by appellant BASF are distinguishable. *See, e.g., Kaufman v. I-Stat Corp.*, 165 N.J. 94, 754 A.2d 1188, 1189 (2000) (addressing common-law fraud claim); *Jiries v. BP Oil*, 294 N.J. Super. 225, 682 A.2d 1241, 1243-44 (Law Div. 1996) (holding plaintiff failed to show ascertainable loss).

BASF next contends that the farmers failed to produce evidence to establish a causal link between BASF's conduct and an ascertainable loss. Again, the standard we must apply is whether the verdict can be sustained on any reasonable theory of evidence. *Pouliot*, 582 N.W.2d at 224.

In *Peterson I*, this court recognized that an ascertainable loss may be shown by the farmers' lost opportunity to refuse to purchase Poast due to BASF's fraud. 618 N.W.2d at 824-25. Here, the farmers assert they showed causation by evidence that they lost the opportunity to protest, petition for relief from governmental agencies, litigate, or simply make an intelligent, informed decision on whether to refuse to buy the more expensive Poast. They presented testimony from various witnesses, including the class representatives, that upon learning of BASF's fraudulent scheme, they engaged in or recommended just such activities. The jury again had evidence from which it could and did find causation. BASF has not shown that it has met the standards for JNOV.

II

BASF next seeks JNOV on the jury's award of damages for the crop years 1992 and 1995-1996. As discussed above, the standard for JNOV is whether the verdict can be sus-

tained on any reasonable theory of the evidence. *Pouliot*, 582 N.W.2d at 224.

In awarding damages under the NJCFA, the goals of the act are twofold. *Cox*, 647 A.2d at 463. First, the act "is clearly remedial in that it seeks to compensate a victim's loss." *Id.* Second, it serves as a deterrent, because it punishes the wrongdoer by awarding the victim treble damages, attorney fees, and costs. *Id.* "[I]n determining whether plaintiff has established a loss under the Act, we are guided by but not bound to strict contract principles." *Id.* at 463-64.

BASF first argues that this court must reduce the portion of the damages attributed to the 1992 Poast sales because they are not supported by the evidence. The jury awarded $2,000,000, and, with treble damages and attorney fees, BASF asserts this amounts to $6,141,356.27.

BASF contends that even accepting the farmers' theory of damages, the record conclusively demonstrates that Poast Plus was not fully EPA-registered for use on minor crops until late October 1992, well after the annual crop season. Consequently, it asserts that no damages may be awarded for that year. It cites a February 18, 1992, EPA letter to BASF indicating that the registration was approved, but requiring submission of several more documents. The letter stated that if BASF did not comply with these conditions, the registration would be cancelled, but that release of the product for shipment constituted acceptance of the conditions.

The jury, however, had evidence to support its award of damages for 1992. First, the jury could have concluded that the product could be released for shipment before the final technical requirements were met. Second, the farmers' expert, who calculated damages, explicitly did not use the entire sales year for his 1992 calculation. Instead, he excluded sales of Poast for January through March because the EPA registration was received in February and it would then take

several weeks to obtain approval from the states. The evidence in the record supported the jury's verdict, and the district court properly denied JNOV on this ground.

Next, BASF contends that it is entitled to partial JNOV as to the damages award for the years 1995 and 1996. The jury awarded $4,000,000 damages for 1995 and $1,000,000 for 1996. BASF calculates that, after these amounts are trebled and prejudgment interest included, this amounts to $16,035,890.66, and BASF seeks reduction of the verdict by this amount.

BASF contends that the farmers cannot as a matter of law sustain their "lost opportunity" claim for 1995 and 1996, which rests on the assertion that BASF deprived them of the opportunity to refuse to buy Poast. It asserts that by May 1994, all of the information concerning EPA minor crop registration of Poast Plus was public knowledge and, by 1996, all of the plaintiffs had actually stopped buying Poast. BASF contends that as a matter of logic, they cannot claim to have suffered an ascertainable loss from a lost opportunity that they actually exploited, based on ignorance of facts they actually knew.

The farmers contend that they presented substantial evidence to the jury that BASF's unlawful conduct resulted in a broad-based, inflated price for the more expensive Poast herbicide resulting from mass consumer deception, exploitation, and "system of deceit." *See Peterson I*, 618 N.W.2d at 824. As discussed above, they asserted that this prevented farmers and state regulatory authorities from ascertaining the truth and consumers lost the opportunity to make informed purchasing decisions. They note that the jury was aware that in 1997, after BASF's scheme was uncovered and litigation commenced, BASF dropped the price of Poast nationwide to a price equivalent to Poast Plus.

The farmers' expert testified extensively as to the basis for his conclusion as to the damages the farmers suffered. He testified that the 1995 damages were $6,440,647, BASF's expert testified they were $2,290,500, and the jury awarded $4,000,000. For 1996, the farmers' expert testified damages were $2,419,533, BASF's expert concluded they were just $550,220, and the jury awarded $1,000,000. The jury heard and considered all the evidence, and there was evidence to support its verdict; the district court did not err in denying JNOV as to damages occurring in 1995 and 1996.

III

BASF contends that it is entitled to a new trial based on the trial court's failure to instruct the jury on numerous crucial elements of its defenses and on its improper admission of evidence.

Jury Instructions

The district court has broad latitude in selecting the language of jury instructions, as well as in determining the propriety of a specific instruction. *Alholm v. Wilt*, 394 N.W.2d 488, 490 (Minn. 1986). Jury instructions will not be reversed absent an abuse of discretion. *Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 147 (Minn. 2002). Where the instructions are overall a correct statement of the law, a new trial is not warranted. *Id.* Jury instructions will be reviewed as a whole. *Lindstrom v. Yellow Taxi Co. of Minneapolis*, 298 Minn. 224, 229, 214 N.W.2d 672, 676 (1974).

The jury instruction charge need only "convey to the jury a clear and correct understanding of the law." *Cameron v. Evans*, 241 Minn. 200, 209, 62 N.W.2d 793, 798 (1954). "Usually it is preferable to give a general charge * * * upon the whole law of the case," rather than risk confusing the jury or emphasizing one side of the case by emphasizing particular items. *Id.* at 209, 62 N.W.2d at 799.

> A party is entitled to a specific instruction on his theory of the case if there is evidence to support the instruction and it is in accordance with the applicable law.

Cornfeldt v. Tongen, 262 N.W.2d 684, 698 (Minn. 1977) (citations omitted).

The district court instructions track virtually verbatim the New Jersey Supreme Court's model NJCFA jury instructions, taken from the New Jersey Model Civil Charges 4.23 (May 1998), http://www.judiciary.state.nj.us/charges/civil/423.htm (last modified Jan. 2001). The instructions describe and define the two relevant bases for liability under the act, affirmative acts and omissions, and address proximate cause and damages.

BASF first contends that the instructions were deficient because they did not define materiality and did not advise the jury that the affirmative misrepresentation had to be material. BASF contends that a statement is material if "a reasonable person would attach importance to its existence in determining a choice of action." *Ji v. Palmer*, 333 N.J. Super. 451, 755 A.2d 1221, 1228 (App. Div. 2000) (quotation omitted).

The court instructed the jury as follows:

> A misrepresentation is an untrue statement, which is made about a fact, *which is important or significant to the sale or advertisement*, and it is communicated to another person to create the possibility that the other person will be misled.

(Emphasis added.) Similarly, the omission instruction refers to omission of "an important or significant fact." BASF has failed to show an abuse of discretion.

Next, BASF challenges the verdict form. A district court has "broad discretion in drafting special-verdict questions." *Russell v. Johnson*, 608 N.W.2d 895, 898 (Minn. App. 2000) (citation omitted), *review denied* (Minn. June 27, 2000).

While BASF acknowledges that the court instructed the jury that any actionable omission must relate to a material fact, it contends that the court committed a reversible error because the verdict form itself did not refer to "material fact." Instead, the verdict form asked:

> Did BASF engage in a knowing omission, suppression or concealment *of the truth in relation to* BASF's marketing and pricing strategies for Poast and Poast Plus?

(Emphasis added.)

First, BASF did not request a separate question on omission in the verdict form, although it did argue that if there were such a question it should refer to materiality. In any event, the materiality issue is encompassed by requiring the jury to find BASF engaged in omissions "in relation to" its marketing and pricing strategies; the jury was instructed as to materiality as well. Considering the instructions as a whole, the court "fairly and correctly stated the applicable law" and did not abuse its discretion. *See Russell*, 608 N.W.2d at 898 (stating this standard) (citation omitted).

Next, BASF challenges the district court's failure to give multiple jury instructions relating to a variety of topics raised at trial. Generally, the trial court is not required to give a specific requested instruction unless it is necessary to allow the jury to intelligently decide the question. *Malik v. Johnson*, 300 Minn. 252, 258, 219 N.W.2d 631, 635 (1974). Applicable statutes and regulations that have the force of law may properly be read to the jury. *Mikes v. Baumgartner*, 277 Minn. 423, 431, 152 N.W.2d 732, 738 (1967).

BASF's proposed instructions do not relate directly to the charge before the jury, which was whether BASF violated the NJCFA. Further, throughout the entire trial, the jury heard numerous discussions of these issues and the various witnesses' descriptions of the effect of the regulations. These topics were more properly the subject of counsel's final ar-

gument rather than jury instructions, and the court did not abuse its discretion in denying the request to include these instructions.

Admissibility of evidence

BASF next argues that the district court erroneously admitted evidence that was either protected by the First Amendment, privileged as a matter of law, or legally irrelevant. The admissibility of

> evidence rests within the broad discretion of the trial court and its ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of discretion.

Uselman v. Uselman, 464 N.W.2d 130, 138 (Minn. 1990) (citation omitted). Before the complaining party can show it is entitled to a new trial based on improper admissions, it must "demonstrate prejudicial error." *Id.* (citation omitted).

We first address BASF's claims that certain evidence was protected by the First Amendment or privileged. BASF contends that its employee's truthful reports to North Dakota officials concerning possible illegal off-label use of Poast Plus were inadmissible because they were protected by the First Amendment and public policy. In support of this argument, it cites primarily defamation cases and a prior restraint case. *See, e.g., Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979) (prior restraint); *Richmond v. Nodland*, 552 N.W.2d 586 (N.D. 1996) (defamation). Here, there is no claim that the reports that BASF seeks to protect were defamatory or that prior restraint was at issue. Instead, the evidence showed that BASF's employee turned in BASF's own dealers on the suspicion that Poast Plus was being used on minor crops for which they were EPA-registered although not state-labeled. This evidence was used to support the farmers' claim of consumer fraud. Misleading and confusing statements are not protected by the First Amendment. *Smith v. Condux Int'l*,

466 N.W.2d 22, 26 (Minn. App. 1991). There is no support for BASF's claim that the First Amendment protects its employee's reports here.

Next, BASF challenges the district court's admission of an article published in the March 1993 issue of The Sugarbeet Grower magazine. The article, submitted by BASF's public relations firm, describes the illegality and consequences of off-label pesticide use, but it does not mention any BASF product. BASF contends that the First Amendment protects true speech even in a lawsuit by a private party, and it cites *N.Y. Times v. Sullivan*, 376 U.S. 254, 265 (1964) (libel). This consumer fraud action, however, does not raise a libel claim. Again, there is no support for BASF's claim that the district court abused its discretion in admitting the magazine article because of First Amendment concerns.

Finally, BASF argues that its employee's statements at the official meeting of the North Dakota Pesticide Control Board were absolutely privileged under North Dakota laws. The code states that "every person * * * has the right of protection from bodily restraint or harm, from personal insult, from *defamation*, and from injury to the persons personal relations." N.D. Cent. Code 14-02-01 (1997) (emphasis added). It provides that a communication made "[I]n any legislative or judicial proceeding or in any other proceeding authorized by law" is a privileged communication. *Id.* 14-02-05(2) (1997). BASF contends that if the statements pertain to the official proceeding, they are absolutely privileged, even if they are false and made with malice. *See Soentgen v. Quain Ramstad Clinic*, 467 N.W.2d 73, 78 (N.D. 1991) (addressing privilege in a defamation action). BASF's argument is flawed for the same reason that its First Amendment argument fails: this is a consumer fraud action, not a defamation action. Consequently, there is no support for BASF's claim that these statements to the North Dakota Pesticide Control

Board were protected by privilege. In conclusion, we note that as to these three claims, BASF cites no direct authority to support its arguments that the evidence was not admissible and has demonstrated no prejudicial error.

BASF next contends that evidence of its reports about possible off-label use by its dealers, the Sugarbeet Grower article, and its appearance before the North Dakota Pesticide Board were irrelevant to the claim of consumer fraud.

> Relevant evidence is that having
>
> any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Minn. R. Evid. 401. Generally, all relevant evidence is admissible. Minn. R. Evid. 402. The district court's decision regarding the admissibility of evidence will not be reversed absent an erroneous view of the law or an abuse of discretion. *Uselman*, 464 N.W.2d at 138.

This evidence was discussed at length at trial and was relevant to the farmers' claim that BASF violated the NJCFA. BASF has not shown that the district court abused its discretion in admitting this evidence.

Finally, BASF contends that the district court improperly allowed the jury to consider what it characterizes as claims of deceptive labeling and differential pricing. This court has considered and rejected most of these claims. *Peterson I*, 618 N.W.2d at 824. To the extent they were already considered, these arguments are stricken. Further, our review shows that the evidence presented and the arguments made were addressed to the issue of consumer fraud. There is no showing of error.

IV

BASF contends that the district court abused its discretion when it refused to decertify the class. In support of this argument, it engages first in an extensive discussion of choice-of-law doctrine and certification law.

In *Peterson I*, this court addressed BASF's challenge to the certification of the farmers as a class for purposes of their NJCFA claim, reviewed under an abuse of discretion standard. 618 N.W.2d at 825-26. This court concluded that "the district court did not abuse its discretion in certifying [the farmers] as a class on their New Jersey Consumer Fraud Act claim." *Id.* at 826.

The farmers moved this court to strike the certification issue. BASF contends, however, that this court did not address its "choice-of-law" argument in *Peterson I* and that it is not precluded from raising the issue in this appeal. The choice-of-law argument is the basis for BASF's certification argument. In *Peterson I* this court decided the certification issue, and thus BASF is precluded from raising it a second time in this appeal. The farmers' motion to strike this argument is granted.

V

Next, we turn to issues relating to prejudgment interest that the farmers raised in their notice of review. The district court determined that the farmers were entitled to prejudgment interest against BASF from December 15, 1997, the date the complaint was filed in district court. The farmers contend that because the damages were ascertainable in each year from 1992 to 1996, prejudgment interest should be calculated from those dates.

On appeal, questions of law governing prejudgment interest are reviewed de novo. *Trapp v. Hancuh*, 587 N.W.2d 61, 63 (Minn. App. 1998). Fact determinations underlying

the application of the statute, such as whether the claim is liquidated, readily ascertainable, or unliquidated, will not be reversed unless clearly erroneous. *Id.*

Generally, prejudgment interest may be awarded from the time of the commencement of the action. Minn. Stat. 549.09, subd. 1(b) (2002). It is also allowable on liquidated claims, as well as on unliquidated claims on which the amount is "readily ascertainable." *Trapp*, 587 N.W.2d at 63.

Damages are readily ascertainable if they can be determined

> by computation or reference to generally recognized standards such as market value and not where the amount of damages depended upon contingencies or upon jury discretion (as in actions for personal injury or injury to reputation).

Potter v. Hartzell Propeller, Inc., 291 Minn. 513, 518, 189 N.W.2d 499, 504 (1971) (citations omitted). The requirement that the damages be ascertainable is based on the theory that it would be

> unreasonable to require defendant to compensate plaintiff for this loss where defendant could not have readily determined the amount of damages himself either by computation or reference to generally recognized standards such as market value.

Id.

In this case, the question is whether the district court was clearly erroneous in determining that the damages were not readily ascertainable. The farmers cite the fact that BASF admitted that an average price differential between Poast and Poast Plus during the class action was $4 per acre. BASF contends that the damage awards rested almost entirely on the discretion of the jury.

Both parties presented experts to calculate damages. BASF's expert arrived at a figure of $7,251,417, while respondents' expert calculated damages of $26,182,501. These differences were based on a variety of factors, including the number of gallons of Poast used per acre, whether "list" or "actual" price was used, the markup attributed to the dealer, and whether or not information for 1992, the first year for which Poast Plus was registered for use on minor crops, was used. Both experts were cross-examined and other witnesses gave testimony as well. The jury verdict for damages was $15,000,000.

A "mere difference" of opinion as to the amount of damages does not preclude an award of prejudgment interest. *Potter*, 291 Minn. at 519, 189 N.W.2d at 504. Instead, the issue is whether the defendant could have ascertained damages from "a generally recognized objective standard of measurement, such as readily ascertainable market value." *Id.*

Here, the experts offered different opinions as to damages based on a variety of factors. The jury's damage award, which is between the amounts offered by the parties' experts, shows that it considered the parties' contentions regarding the dates and extent of damages and other factors. The district court was not clearly erroneous in determining that damages were not readily ascertainable.

The farmers also contend that prejudgment interest is considered part of the substantive damages which, under New Jersey law, is subject to mandatory trebling. The NJCFA states, "[I]n any action under this section the court shall, in addition to any other appropriate legal or equitable relief, award threefold the damages sustained by any person in interest." N.J. Stat. 56:8-19. The farmers contend that prejudgment interest constitutes substantive damages intended to compensate the victim for deprivation of the monetary value of their loss. *See Busik v. Levine*, 63 N.J. 351, 307

A.2d 571, 575 (1973) (finding that prejudgment interest is compensatory as to the parties and represents damages for delay in payment).

The prejudgment interest statute is considered more procedural than substantive so that the law of the forum state applies. *Zaretsky v. Molecular Biosystems, Inc.*, 464 N.W.2d 546, 550-51 (Minn. App. 1990). Prejudgment interest is an element of compensatory damages. It is "awarded to provide full compensation by converting time-of-demand * * * damages into time-of-verdict damages." *Lienhard v. State*, 431 N.W.2d 861, 865 (Minn. 1988) (citations omitted). Where interest was awarded on trebled damages, this court allowed interest only on the first third of the trebled damages.

> [O]nly the first third of the trebled damages is compensatory. The remainder is at least "noncompensatory" and the trial court's allowance of prejudgment interest on this amount must be reversed.

Muehlstedt v. City of Lino Lakes, 473 N.W.2d 892, 896 n.2 (Minn. App. 1991) (quoting Minn. Stat. 549.09, subd. 1(b)(4) (1990)), *review denied* (Minn. Sept. 25, 1991).

Consequently, the district court properly applied interest only to the damages award, not the trebling of the damages award.

DECISION

BASF has not demonstrated that it is entitled to JNOV on the jury's verdict that it engaged in consumer fraud or on the jury's award of damages. The district court did not abuse its discretion in its jury instructions, the verdict form, or in its admission of evidence. As to BASF's challenge to the class certification, this court decided the issue in *Peterson I* and under the law-of-the-case doctrine, the issue may not be raised again in this appeal. Finally, we affirm the district court's decision on prejudgment interest issues that the farm-

ers challenge in their notice of review. In conclusion, the district court decision is affirmed, and the farmers' motions to strike are granted in part.

Affirmed.

G. BARRY ANDERSON, Judge (concurring specially).

I concur with the majority here, largely because of our prior holding in *Peterson v. BASF Corp.*, 618 N.W.2d 821 (Minn. App. 2000), *review denied* (Minn. Jan. 26, 2001).

But while respondents have put together a persuasive set of facts outlining misconduct on the part of appellants, at the end of the day, this dispute is the poster child for national class action reform. We have here a Minnesota district court, applying a New Jersey consumer fraud statute to a nation-wide class of plaintiffs, with few of those plaintiffs residing in New Jersey. And, it is probably a fair assumption that the legislative authors of the New Jersey consumer protection scheme did not have in mind midwestern farmers purchasing agricultural chemicals as the protected class. Indeed, at least one of the amicus briefs notes that the connections with New Jersey are hardly overwhelming.

This is not a recipe for uniformity or consistency, it is fair neither to claimants nor defendants and it is long past time for national policy makers to address class action procedures.

SUPREME COURT OF THE UNITED STATES

No. 04-81

BASF CORPORATION,

Petitioner

v.

RONALD PETERSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI to the Supreme Court of Minnesota.

THIS CAUSE having been submitted on the petition for a writ of certiorari and response thereto.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the petition for a writ of certiorari is granted, and the judgment of the above court is vacated with costs, and the case is remanded to the Supreme Court of Minnesota for further consideration in light of *Bates* v. *Dow Agrosciences, LLC*, 544 U.S. ___ (2005).

IT IS FURTHER ORDERED that the petitioner BASF Corporation recover from Ronald Peterson, et al., Three Hundred Dollars ($300.00) for costs herein expended.

May 2, 2005

Clerk's costs: $300.00

Supreme Court of Minnesota

RONALD PETERSON, ET AL.,
Respondents,

v.

BASF CORPORATION, *a foreign corporation,*
Appellant.

No. C3-02-857.

Feb. 19, 2004.

Heard, considered, and decided by
the court en banc.

OPINION

GILBERT, Justice.

This appeal arises out of a nationwide consumer fraud class action in which a group of farmers ("farmers") asserted that BASF Corporation's ("BASF") marketing misled and deceived American farmers into believing that a BASF herbicide, Poast Plus, could not be used on crops such as sugar beets. The farmers claimed that BASF's marketing manipulated them into purchasing Poast, a higher-priced BASF herbicide. BASF appeals the judgment rendered against it for violating the New Jersey Consumer Fraud Act ("NJCFA"), N.J. Stat. Ann. §§ 56:8-1-56:8-116 (West 2002), which the court of appeals affirmed. BASF argues that class certification and the application of New Jersey law to all the claims in the class were inappropriate, federal law preempts the farmers' consumer fraud claims, and the evidence was not sufficient to establish consumer fraud under the NJCFA. We affirm.

BASF is a Delaware corporation with its principal office in New Jersey. In the late 1970s and early 1980s, BASF began developing and testing Poast herbicide for use in control-

ling grass weeds. Around 1982, BASF registered Poast with the Environmental Protection Agency (EPA) as a post-emergent grass herbicide and began marketing the product for use. Over time, BASF sought approval from the EPA for the use of Poast on more crops and by 1992 Poast was EPA and state registered for use on over 60 crops, including all "major" crops most "minor" crops.

"Major," or high acreage crops, include soybeans, corn, and cotton, which are farmed on millions of acres of land but provide a relatively low financial return per acre. "Minor," or high value crops, include sugar beets, vegetables, grapes, citrus fruits, and sunflowers. These crops are farmed on fewer acres, but yield a much greater profit per acre. When Poast was developed, it was the only post-emergent herbicide available for use on a number of minor crops. According to research funded by the United States Department of Agriculture, the herbicide market for minor crops has little competition because the market potential for a pest control product on specific crops is low, giving agricultural companies little incentive to absorb the cost of developing the data necessary for registration of a herbicide on individual crops, particularly minor crops.[1]

The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") is a comprehensive regulatory system that governs herbicide/pesticide marketing and use.[2] FIFRA provides that a pesticide may only be distributed or used on a particu-

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[1] Interregional Research Project No. 4 (The IR-4 Project), A Minor Crop Pest Control Strategy: 1995-2002.

[2] The terms "herbicide" and "pesticide" are used interchangeably in this opinion. Under the FIFRA, the term "pesticide" means "any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest," which includes "weed[s]." 7 U.S.C. § 136(t), (u) (2000).

lar crop if the EPA has registered it for use on that crop. 7 U.S.C. § 136a(a) (2000). In addition, a state may regulate the sale or use of any federally registered pesticide to the extent the regulation does not permit any sale or use prohibited by federal law. 7 U.S.C. § 136v(a) (2000). The EPA does not, however, regulate marketing decisions on pesticide use. Federal regulations provide that "[a] registrant may distribute or sell a product under labeling bearing any subset of the approved directions for use, * * *." 40 C.F.R. § 152.130(b) (2000). However, if a registrant does not sell a product for use on a crop with labeling bearing approved directions for use, a state may, under section 24(c) of FIFRA, issue a "special local needs" registration for a product for crop uses that the EPA has approved. See 40 C.F.R. §§ 162.150-162.156 (2000).

In addition to registration requirements, federal regulations require distributors of pesticides to comply with packaging and labeling regulations. "Every pesticide product shall bear a label containing the information specified by [FIFRA] and the regulations in this part * * *." 40 C.F.R. § 156.10(a)(1) (2000). Pesticide labels must contain information on content, hazards, instructions for use, restrictions on use, and much more. *Id.* Use of a pesticide for a purpose or product not specified in the label is referred to as "off-label" use.

In the late 1980s, BASF began developing another agricultural herbicide, Poast Plus. Evidence was presented at trial on the similarities and differences between Poast and Poast Plus. The two products contain the same active ingredient, sethoxydim, which is equivalent between them in amounts distributed per acre.[3] Poast Plus, however, also con-

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[3] Poast is formulated with 18% sethoxydim and covers 8 acres per gallon after being mixed – a ratio of 0.19 pounds/acre. Poast

tains a crop oil adjuvant[4] that, according to its patent, allows the mix, when added to water, to provide "equal or better herbicidal efficiency" than standard herbicide formations when mixed. Poast and Poast Plus are patented separately and the EPA required BASF to register the products separately. See 40 C.F.R. § 152.43(a) (2000).[5] The EPA registered Poast Plus for use on the same 60 crops for which Poast was registered because registration was based on the same residue data that BASF used for Poast, which the EPA allowed because the two products use the same active ingredient.

However, BASF obtained state registration and labeled Poast Plus for use on only four crops: soybeans, cotton, peanuts, and alfalfa. From 1992-1996, Poast Plus was priced at approximately $4 per acre less than Poast. Evidence was presented at trial that BASF's strategy was to segment the market for the products between major and minor crops. For example, a 1990 BASF marketing plan stated that BASF's goal was to systematically replace Poast sales in soybeans and cotton with Poast Plus while aggressively positioning the higher-priced Poast in the market for minor crops, where there was less competition. The farmers argued that by limiting the number of crops for which Poast Plus was labeled, BASF was able to target the less-expensive Poast Plus in the

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Plus is formulated with 13% sethoxydim and covers 5.3 acres per gallon after being mixed – a ratio of 0.19 pounds/acre.

[4] An "adjuvant" is "an ingredient (as in a prescription or a solution) that modifies the action of the principal ingredient." *Merriam Webster's Collegiate Dictionary* 15 (10th ed. 1986).

[5] "A product proposed for registration must have a single, defined composition, except that EPA may approve a basic formulation and one or more alternative formulations for a single product." 40 C.F.R. § 152.43(a) (2000).

more competitive major crop market and target Poast for sale in the less competitive minor crop market. According to the farmers, evidence indicated that BASF intended to conceal that Poast Plus was EPA approved for the same 60 crops as Poast.

The farmers presented evidence at trial that BASF advertised Poast as the "only" post-emergent grass herbicide registered for use on minor crops. Poast Plus, according to BASF advertisements, was "registered" for use only on cotton, soybeans, peanuts, and alfalfa, while Poast was "registered" for use on over 60 crops. BASF mailed a letter to food suppliers enclosing a list of BASF products and the crops for which they were registered making these claims. The letter stated that the goal of this list was to "ensure our food supply remains the safest in the world" by "informing producers and processors alike of proper pesticide use." A BASF executive testified that he considered it a material omission to say that Poast Plus was only registered for use on four crops.

In the early-to-mid 1990s, sugar beet farmers in North Dakota began to purchase the less expensive Poast Plus and use it off-label on crops not labeled for use by Poast Plus. A BASF sales representative informed the North Dakota Department of Agriculture of the off-label use, which led the department to fine these farmers as well as the wholesale distributors of Poast Plus.[6] To further inhibit off-label use, BASF's public relations firm submitted an article published in *Sugarbeet Grower* magazine, which discussed the illegality of off-label use of herbicides and increased enforcement

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[6] FIFRA allows the EPA and state departments of agriculture to enforce violations of product labels ("off-label" use) with civil administrative penalties, criminal sanctions, and fines. See 7 U.S.C. § 136j-m (2000).

of penalties for not following the recommendations on pesticide labels.

The North Dakota Commissioner of Agriculture began to investigate Poast Plus' registration by making inquiries with BASF and the EPA. BASF representatives responded that BASF could not add crops to the Poast Plus label because the EPA would require it to do further residue testing, which would cost the company millions of dollars. The EPA, however, responded with information that Poast Plus was registered for use on the same crops as Poast, and that the farmers' problem stemmed from a company marketing decision. In 1995, the State of North Dakota and the State of South Dakota issued section 24(c) special local needs registrations for Poast Plus to be used on minor crops such as sugar beets and dry beans. BASF wrote the EPA, arguing that the purpose of section 24(c) registrations was violated by states being allowed to issue them solely on the basis that Poast Plus was a less-expensive sethoxydim-based product.

This class action before us here on appeal commenced in 1997. On July 15, 1999, the district court certified a nationwide class of plaintiffs to bring suit under the NJCFA,[7] finding that the farmers met the requirements of Minn. R. Civ. P. 23. The court concluded that it was neither arbitrary nor fundamentally unfair to certify a nationwide class for claims brought under the NJCFA and that class certification was ap-

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[7] The New Jersey Consumer Fraud Act provides, in part, "The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate * * * is declared to be an unlawful practice." N.J. Stat. Ann. § 56:8-2 (West 2002).

propriate because of the vast number of potential plaintiffs, the small size of individual claims, the common nature of the claims based on BASF's national marketing practices, and the public interest in seeing that the rights of consumers are vindicated. The class consists of U.S. farmers who purchased Poast herbicide from BASF from 1992-96, excluding North Dakota farmers who had previously brought a separate class action suit that was settled in 1997. On March 1, 2000, the district court denied BASF's subsequent motion to decertify the class, but granted BASF's motion for summary judgment, concluding that BASF's actions were not fraudulent or unconscionable and the farmers did not suffer an ascertainable loss, as required by the NJCFA.

On April 27, 2000, the farmers filed an appeal with the court of appeals, challenging the district court's grant of summary judgment. On May 1 and May 2, 2000, BASF filed notices of review pursuant to Minn. R. Civ. App. P. 106,[8] specifically challenging in both that the district court erred (1) in certifying a nationwide class under the NJCFA and (2) in denying BASF's later motion to decertify the class. The court of appeals ordered that BASF's separate appeals were unnecessary and that both parties could proceed with their issues in the farmers' appeal.

After hearing both arguments, the court of appeals reversed the district court's grant of summary judgment, holding that "whether BASF's actions rise to the level of fraud or an unconscionable commercial practice under the [NJCFA] are issues for a jury to decide." *Peterson v. BASF Corp.*, 618 N.W.2d 821, 825 (Minn. App.), *rev. denied* (Minn. Jan. 26,

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[8] "A respondent may obtain review of a judgment or order entered in the same action which may adversely affect respondent by filing a notice of review with the clerk of the appellate courts * * *." Minn. R. Civ. App. P. 106.

2001) ("*Peterson I*"). The court of appeals also held that the district court's decision to certify the farmers as a class was not an abuse of discretion. *Id.* at 826.

Following *Peterson I*, BASF petitioned us for review on two specific issues: (1) whether *Peterson I* improperly created a new duty requiring a manufacturer to provide the farmers with the opportunity to purchase a herbicide for a specific use, and (2) whether *Peterson I* improperly created a measure of damages based on the lost opportunity to choose to purchase Poast Plus and "allow[ed] that measure to apply to a nationwide class action." We denied the petition for review. Upon remand to the district court, BASF filed a second motion to decertify the class action. The district court denied that motion on September 11, 2001.

At trial, the jury was presented with a special verdict form and found by unanimous vote that BASF "engage[d] in an unconscionable commercial practice, deception, fraud, false pretense, false promise, or misrepresentation in relation to BASF's marketing and pricing strategies for Poast and Poast Plus herbicides" and "engage[d] in a knowing omission, suppression or concealment of the truth in relation to BASF's marketing and pricing strategies for Poast and Poast Plus." The jury also found that BASF's conduct or actions caused the farmers an ascertainable loss. At trial, the farmers had presented an expert witness who testified that based on the difference in price between Poast and Poast Plus and the number of gallons of Poast sold in the United States according to market survey data, actual damages for the years 1992 through 1996 should amount to $26,182,501. BASF presented its own expert who calculated the price differential of Poast and Poast Plus based on BASF's data, concluding that actual damages should amount to $7,251,417. The jury awarded the farmers actual damages totaling $15,000,000.

Pursuant to New Jersey law,[9] the district court trebled the damages and awarded prejudgment interest and attorney fees, entering a judgment totaling $52,058,931.51. The district court denied BASF's motion for JNOV and partial JNOV as to the damages awarded for the year 1992 and for the years 1995 and 1996.

The court of appeals affirmed the district court judgment. *Peterson v. BASF Corp.*, 657 N.W.2d 853 (Minn. App. 2003) ("*Peterson II*"). The court of appeals held that BASF was not entitled to JNOV or partial JNOV. *Id.* at 868, 870. The court of appeals also held, among the other issues, that FIFRA did not preempt the farmers' consumer fraud action and that BASF was not entitled to a new trial based on its contention that the district court failed to instruct the jury on critical elements of its defenses or its contention that the district court improperly admitted evidence. 657 N.W.2d at 865, 871, 872-73. Furthermore, the court of appeals held that BASF's challenge to the district court's denial of its motion to decertify the class and the district court's decision to apply New Jersey law to all of the claims was barred from appeal by the law of the case doctrine. *Id.* at 873. Regarding decertification of the class and choice of law, the court of appeals reasoned that it had decided class certification in *Peterson I*, the decision to apply New Jersey law was an underlying issue to class certification, and thus BASF was precluded from raising the issues before the court of appeals a second time. 657 N.W.2d at 873.

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[9] "In any action under [the NJCFA] the court shall, in addition to any other appropriate legal or equitable relief, award threefold the damages sustained by any person in interest. In all actions under [the NJCFA], * * * the court shall also award reasonable attorneys' fees, filing fees and reasonable costs of suit." N.J. Stat. Ann. § 56:8-19 (West 2002).

BASF petitioned us for review specifically on the following issues: (1) whether the U.S. Constitution and the *Milkovich* test[10] permit application of the NJCFA to the claims of a nationwide class; (2) whether federal law preempts the farmers' consumer fraud claims based on deceptive labeling; and (3) whether the verdict was tainted based on BASF's First Amendment rights. BASF also stated in its petition for review that "this appeal raises other legal issues, including causation, materiality, product safety, class propriety, ascertainable loss, patent preemption, the 'duty to market,' and evidentiary support for hotly disputed facts."

We granted review to address the "issues raised [by BASF] in the petition for further review," with the exception of BASF's First Amendment argument. In addition, we asked the parties to address: (1) whether law of the case principles preclude supreme court review of underlying issues pertaining to class certification; and (2) if law of the case principles do not preclude supreme court review of the underlying issues, whether the district court improperly certified the class.

I.

We begin by addressing the effect of the law of the case doctrine on this appeal. Law of the case is a rule of practice that once an issue is considered and adjudicated, that issue should not be reexamined in that court or any lower court throughout the case. *See Sigurdson v. Isanti County*, 448 N.W.2d 62, 66 (Minn. 1989); *L.K. v. Gregg*, 425 N.W.2d 813, 815 (Minn. 1988). The rule is not a limitation on the power of a court to reexamine an issue – it is "a rule of practice, not of substantive law." *Braunwarth v. Control Data Corp.*, 483 N.W.2d 476, 476 n.1 (Minn. 1992). While courts have the power to review and overrule their determination on

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[10] *Milkovich v. Saari*, 295 Minn. 155, 203 N.W.2d 408 (1973).

a prior appeal in the same case, they typically do not do so as a matter of policy. *See, e.g., Mattson v. Underwriters at Lloyds of London*, 414 N.W.2d 717, 720 (Minn. 1987). There are, of course, exceptions. When there has been a change in the law by a judicial ruling entitled to deference between appeals of the case, law of the case does not typically apply. *Brezinka v. Bystrom Bros., Inc.*, 403 N.W.2d 841, 843 (Minn. 1987); *Sands v. Am. Ry. Express Co.*, 159 Minn. 25, 26, 198 N.W. 402, 402 (1924). Similarly, when the evidence on which an appellate court based its prior decision is substantially different on the second appeal, law of the case does not preclude reconsideration. *Cayse v. Foley Bros., Inc.*, 260 Minn. 248, 253, 110 N.W.2d 201, 204 (1961).

The law of the case doctrine does not generally bar a higher court from reviewing an earlier decision of a lower court, although other interests such as finality and "encourag[ing] compliance with fair and efficient procedure" may weigh into the court's decision to exercise review. 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4478.6 (2d ed. 2002); *accord Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) ("Just as a district court's adherence to law of the case cannot insulate an issue from appellate review, a court of appeals' adherence to the law of the case cannot insulate an issue from [the U.S. Supreme] Court's review."); *Dobrin v. Dobrin*, 569 N.W.2d 199, 201 (Minn. 1997) (acknowledging that the first court of appeals decision was the law of the case following denial of a petition for review and, as such, generally not subject to reexamination on a second appeal to the court of appeals, but nevertheless reviewing and reversing the first court of appeals decision). We therefore hold that even though the court of appeals adhered to the law of the case based on its earlier holding, the law of the case

doctrine does not preclude our review of issues decided by the court of appeals in *Peterson I*.

A separate issue, however, is the appropriateness of reviewing an issue that could have been raised in a prior appeal, but was not. The farmers argue that BASF is barred from challenging class certification and the application of New Jersey law to all the claims in the class because it failed to raise these issues in its petition for review to us following *Peterson I*. Rule 117 of the Minnesota Rules of Civil Appellate Procedure provides that a party seeking review of a decision by the court of appeals may petition the supreme court for discretionary review. The petition shall contain, among other things, "a statement of the legal issues sought to be reviewed, and the disposition of those issues by the Court of Appeals." Minn. R. Civ. App. P. 117, subd. 3(a). In order to facilitate fair and efficient judicial proceedings, matters that are ripe for review should be brought to the court's attention when submitting a petition for review.[11] In *Hoyt Investment*

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[11] As Wright, Miller & Cooper put it, in the context of a party failing to argue an issue when an appeal is actually taken:

> There are powerful reasons to insist that all matters ripe for review at the time an appeal is taken be presented for review or abandoned. Part of the price paid for the final-judgment rule is that trial-court proceedings may be tainted by an unappealable ruling and require expensive and time-consuming reconstruction after the opportunity for appeal finally becomes available. There is no reason to pay this price when there was an opportunity for review in the course of an appeal that was actually taken. Even when consideration of the matter on a later appeal would terminate all further proceedings, loss of the opportunity to terminate further proceedings at the time of the earlier appeal exacts a cost. These considerations, however, are a function of efficient relationships between appellate courts and trial courts, not law of the case. The solid explanation is the common ex-

Co. v. Bloomington Commerce & Trade Center Associates, 418 N.W.2d 173 (Minn. 1988), we addressed an appellant's failure to appeal an issue to the supreme court. We noted that the Rules of Civil Appellate Procedure "impose[ ] upon counsel the obligation to state with specificity in their respective briefs the precise nature of the relief sought from the appellate court." *Id.* at 175. "In their petition for further review from the original court of appeals' decision, [the appellants] could have and should have brought the error to [our] attention." *Id.* at 176. When submitting a petition for review, a party should bring issues ripe for review to the supreme court's attention with specificity, or waive the opportunity to have them reviewed.

Accordingly, in this case, we must first determine whether BASF's arguments on class certification and choice of law were ripe for review following the court of appeals' decision in *Peterson I*. The procedural background of this case and the nature of class certification may make this case practically unique. The district court certified the nationwide class in part because of the common nature of the claims that could be brought under the NJCFA. The court denied BASF's subsequent motion to decertify the class, but granted BASF's motion for summary judgment in the same order. After the farmers appealed the grant of summary judgment, BASF appealed separately to the court of appeals, specifically challenging the orders granting class certification and denying decertification of the class. BASF argued that class certification was inappropriate because a detailed choice of law analysis was in order using Minnesota's "significant contacts" test, set forth in *Milkovich v. Saari*, 295 Minn. 155,

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planation of forfeiture – procedural efficiency depends on reliable sanctions.

18B Wright, Miller & Cooper, *supra*, § 4478.6 (footnotes omitted).

203 N.W.2d 408 (1973), and because different states' consumer protection laws required those laws to be applied wherever Poast and Poast Plus were purchased or applied. The court of appeals affirmed the district court's certification of the class, but did not conduct a choice of law analysis. *Peterson I*, 618 N.W.2d at 826. Following our denial of review, BASF again moved the district court to decertify the class, asserting that it was unconstitutional to apply the NJCFA to all the claims of the case and that a *Milkovich* choice of law analysis was required. The district court denied that motion.

Based on this procedural history, we conclude that BASF's arguments on class certification, decertification, and choice of law in a nationwide class were ripe for review following the court of appeals' decision in *Peterson I*. BASF specifically filed a notice of review with the court of appeals on class certification and decertification. These issues could have been raised in BASF's petition for review to us following *Peterson I*. BASF argues that the constitutionality and appropriateness of applying the NJCFA are "distinct" issues, which would not have been ripe for review following *Peterson I*. However, BASF has consistently argued the constitutionality of applying the NJCFA and the need to conduct a detailed choice of law analysis in the context of class certification and decertification. These arguments were made to the court of appeals in *Peterson I* and the same arguments were made in BASF's motion to the district court to decertify the class following *Peterson I*. Choice of law and the constitutionality of applying a state's law were underlying issues to BASF's arguments on class certification and decertification.

Moreover, because a determination on class certification is so important to a class action, a determination as to whether a class action can be maintained should be made as soon as practicable. *Cf.* Minn. R. Civ. P. 23.03(a) ("As soon as practicable after the commencement of an action brought

as a class action, the court shall determine by order whether it is to be so maintained."). Class certification and choice of law are legal issues and would have been appropriate on a petition for review following *Peterson I*. For strategic purposes, presumably, BASF chose instead to raise these issues with the district court in the context of a decertification motion. As a result, we conclude that the district court's decisions to apply New Jersey law to all the claims in this case, as well as BASF's challenge to class certification, were ripe for review by the supreme court following the court of appeals' decision in *Peterson I*.

BASF argues additionally that it raised the application of New Jersey law and class certification in its petition for review following *Peterson I*. We disagree. In its petition for review, BASF raised two issues: whether as a matter of law BASF's actions could have violated the NJCFA and whether as a matter of law there was an ascertainable loss leading to measurable damages, with *Peterson I* "allow[ing] that measure to apply to a nationwide class action." BASF argues that it raised the class certification issue "as it then existed." However, it is clear that BASF was only petitioning us to consider whether BASF's actions violated the NJCFA and on damages issues. In BASF's petition for review following *Peterson I*, it failed to even mention class certification, decertification, or the need for a *Milkovich* analysis, except to say in passing in the very last sentence of its argument in support of petition that "the lower court without discussion imposed its new damages rule on a New Jersey statute and improperly projected the rule onto a nationwide class." We conclude that BASF failed to raise with specificity class certification, decertification, and its choice of law argument to us following *Peterson I*.

Since BASF's petition for review following *Peterson I*, there have not been any significant changes in the law or in the facts of the case that would make review of class certifi-

cation or decertification any different now than it would have been when BASF first petitioned us for review.[12] BASF argues that the law has changed because the U.S. Supreme Court's recent decision in *State Farm Mutual Insurance Co. v. Campbell* held that it was a violation of due process to award punitive damages in large proportion relative to compensatory damages. 538 U.S. 408 (2003). However, BASF is incorrect that *State Farm* prohibits the application of the NJCFA to this case. *State Farm* dealt with excessive punitive damages as a violation of due process and had nothing to do with class certification or choice of law in a class action certification.

Based on the unique procedural history of this case, we conclude that consideration of BASF's arguments on class certification and the decision to apply New Jersey law to all the claims in the class in this appeal would undermine principles of fairness and judicial economy. BASF failed to raise these issues when they were ripe for review following *Peterson I*. We therefore hold that BASF waived its opportunity to have these issues considered by us and we will not address them in this appeal.

II.

We next consider BASF's contention that federal law preempts the farmers' consumer fraud claims. BASF argues that the farmers' claims were preempted (1) because FIFRA and EPA regulations prohibit any claim that Poast and Poast Plus are the same product and (2) because FIFRA's labeling

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[12] Unlike the facts before us in *Ario v. Metropolitan Airports Comm'n*, 367 N.W.2d 509 (Minn. 1985), where we held that a denial of class certification was not law of the case because the class was drastically different, nothing in the record here indicates that the class is any different than it was following *Peterson I*; thus, we are not presented with a case of substantial changes to the class.

provisions preempt what BASF describes as an attack on the content of the Poast and Poast Plus labels. Preemption is a question of law, which we review de novo. *Martin ex rel. Hoff v. City of Rochester*, 642 N.W.2d 1, 9 (Minn. 2002).

To begin with, we disagree with BASF's first argument – that the claims in this case are preempted because the central foundation of the farmers' claims is the assertion that under state law Poast and Poast Plus are the same product. The farmers' NJCFA claims were based on alleged unconscionable commercial conduct with regard to EPA-authorized uses of the products. Although evidence was presented that Poast and Poast Plus are essentially the same product – for example, evidence showed that Poast and Poast Plus contain the same amount of active ingredient, sethoxydim, per acre – this evidence was presented to illustrate what the farmers alleged was a scheme to exploit the farmers through consumer fraud. The farmers' consumer fraud claim was not based on Poast and Poast Plus being the same product, but rather on BASF violating the NJCFA by making misrepresentations about the products, which included providing as relevant evidence the fact that they contained the same active ingredient and were EPA approved for use on the same crops.

BASF's second argument, that FIFRA's labeling provisions preempted the farmers' claims, requires us to address FIFRA preemption in more detail. Federal preemption of state law is determined by examining congressional intent. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137-38 (1990). When Congress has included an express provision in the statute that provides a reliable indication of congressional intent, there is no need to imply Congress' intent. *Kuiper v. Am. Cyanamid Co.*, 131 F.3d 656, 661-62 (7th Cir. 1997). Such a provision is present in FIFRA. *See Kuiper*, 131 F.3d at 661-62. FIFRA expressly provides that a state "may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation

does not permit any sale or use prohibited by this subchapter." 7 U.S.C. § 136v(a) (2000). Further, a state "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." 7 U.S.C. § 136v(b) (2000).

It is well established that FIFRA preempts state actions relating to labeling and packaging.[13] *See, e.g., Kuiper*, 131 F.3d at 663 (holding that a products liability action based on off-label misrepresentations, which essentially repeated the information/restrictions found on a herbicide's label, was preempted under FIFRA). Courts have also found that state law claims "'*premised* on inadequate labeling or a failure to warn,' which result[ ] in the imposition of additional or different labeling requirements" are preempted "regardless of the guise under which the claim[s][are] presented." *Netland v. Hess & Clark, Inc.*, 284 F.3d 895, 900 (8th Cir. 2002) (holding that a state action based on defective design was preempted because the premise of each claim was the pesticide manufacturer's label) (quoting *Nat'l Bank of Commerce v. Dow Chem. Co.*, 165 F.3d 602, 608 (8th Cir. 1999)); *ac-*

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[13] In *Goeb v. Tharaldson*, 615 N.W.2d 800, 817 (Minn. 2000), we analyzed the issue of FIFRA preemption with regard to common law tort actions arising out of injuries after exposure to insecticides. We reiterated the finding that courts "uniformly hold that FIFRA preempts claims relating to labeling and packaging of federally-registered pesticides" and therefore held that FIFRA preempted the plaintiffs' claims dealing with "failure to warn" and "inadequate labeling." *Id.* We also addressed plaintiffs' claims of negligent misrepresentation and negligent testing of products, finding that "claims of negligent misrepresentation and negligent testing [were] not preempted by FIFRA." *Id.* at 819. These negligent misrepresentation claims centered around "the EPA registration process." *Id.* at 818. We did not thoroughly evaluate the misrepresentation issue, however, because the plaintiffs in *Goeb* did not petition for review of these claims. *See id.* at 818-19.

cord Worm v. Am. Cyanamid Co., 5 F.3d 744, 747-48 (4th Cir. 1993) (concluding in the context of state law defective design actions that one factor to consider in resolving the preemption issue is whether one could reasonably foresee that the manufacturer, in seeking to avoid liability for the error, would choose to alter the product or label). In *Mortellite v. Novartis Crop Protection, Inc.*, the federal district court for the District of New Jersey recently addressed FIFRA preemption in the context of a NJCFA claim. 278 F. Supp. 2d 390 (D.N.J. 2003). In *Mortellite*, blueberry farmers sued the manufacturer of an insecticide for consumer fraud, alleging that false marketing statements in brochures about product safety caused them to use the product in a dangerous manner. *Id.* at 393. The court found that "[w]hen advertising or promotional materials merely repeat information or language contained on the label, claims directed at the advertising necessarily challenge the label itself and are therefore preempted." *Id.* at 401. The court classified the plaintiffs' NJCFA claim as a negligent failure to warn claim and found it to be preempted. *Id.*

In the matter before us, the farmers argue that their consumer fraud claim is not based on BASF's labels but rather on fraudulent marketing techniques. The court of appeals agreed. It held that "the farmers' claims were based on BASF's misleading statements and omissions as to the EPA-authorized uses of the products, not on the claims that BASF committed fraud in the labeling or packaging." *Peterson II*, 657 N.W.2d at 865. Further, the court of appeals noted that "the farmers here were not asserting that BASF's registration and container labels were false or misleading, * * * [r]ather, the farmers' point was that *even if* BASF's labels were technically accurate, BASF could and did commit consumer fraud by leading farmers to believe that the cheaper Poast Plus could only be used on major crops * * *." *Id.*

We agree with the court of appeals. Although evidence was presented at trial based on statements derived from the Poast and Poast Plus labels, the farmers' claims of unconscionable commercial conduct derived from statements and actions that went beyond the label. For example, the farmers presented evidence that BASF advertised Poast Plus as only "registered" for use on cotton, soybeans, peanuts, and alfalfa, and advertised that Poast was the "only" post-emergent grass herbicide registered for use on minor crops, which a BASF executive candidly admitted was a material omission. Additionally, BASF attempted to prevent word from spreading that Poast Plus was registered for use on minor crops. A BASF sales representative informed authorities that farmers were using Poast Plus on minor crops, BASF had its public relations firm submit a magazine article discussing increased enforcement of fines for failing to follow label recommendations, and BASF told the North Dakota Department of Agriculture that BASF could not add crops on the Poast label to the Poast Plus label because the EPA would require it to do further residue testing, which would cost the company millions of dollars. BASF's alleged unconscionable conduct went beyond the label and the reach of federal law. As an EPA representative stated in correspondence with the North Dakota Commissioner of Agriculture, the "problem appears to stem from a company marketing decision in which the EPA had no input." This differs from *Mortellite* where the representations made in the brochures complained of "merely repeat[ed] information or language contained on the label." 278 F. Supp. 2d at 401; *accord Anderson v. Dow Agrosciences LLC*, 262 F. Supp. 2d 1280, 1291 (W.D. Okla. 2003) (holding claims based on off-label statements by the representatives of a herbicide manufacturer were not preempted).

Moreover, under the *Worm* analysis, the issue is "whether one could reasonably foresee that the manufacturer, in seek-

ing to avoid liability for the error, would choose to alter the product or label." *Worm*, 5 F.3d at 747-48; *see also Gooch v. E.I. Du Pont de Nemours & Co.*, 40 F. Supp. 2d 863, 873 (W.D. Ky. 1999) (stating the analysis as "if [a] manufacturer could avoid liability by altering the label, then FIFRA preempts the claim giving rise to that liability."). That is not the case here. BASF argues that it could not have altered the label because it did not seek state registration of Poast Plus for all the crops for which Poast was state registered. But, the "problem," as an EPA representative called it, was BASF's failure to seek state registration for Poast Plus on all the crops, and more to the point for consumer fraud purposes, BASF's repeated, published, and planned misrepresentations about Poast Plus' EPA registration. It was these actions that the farmers allege amounted to consumer fraud. Accordingly, we affirm the court of appeals and hold that the farmers' NJCFA claims were not preempted by FIFRA.

III.

Lastly, we address BASF's argument that it is entitled to JNOV because the farmers did not establish any actionable conduct, did not prove a sufficient causal nexus between BASF's actions and any injury suffered, and did not prove that the farmers suffered an "ascertainable loss" as required by the NJCFA. *See* N.J. Stat. Ann. 56:8-19. Where the district court has denied a motion for JNOV, we review the issue de novo. *Poulliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998). However, if there is "any competent evidence reasonably tending to sustain the verdict," we do not set the verdict aside. *Id.* On a motion for JNOV, a court must consider whether viewing the evidence in the light most favorable to the nonmoving party, (1) the verdict is manifestly against the entire evidence or (2) whether despite the jury's findings of fact, the moving party is entitled to judgment as a matter of law. *Id.*

A. Liability

The NJCFA makes illegal "any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise * * *." N.J. Stat. Ann. 56:8-2. In general, the NJCFA has three categories of unlawful practices: affirmative acts, knowing omissions, and regulatory violations. *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 647 A.2d 454, 462 (1994). Two of those three categories are relevant to this case – affirmative acts and knowing omissions – and are examples of what the NJCFA defines as "unconscionable" conduct. *Byrne v. Weichert Realtors*, 290 N.J. Super. 126, 675 A.2d 235, 240 (1996). "Unconscionable commercial practice" in this context is "an amorphous concept obviously designed to establish a broad business ethic." *Kugler v. Romain*, 58 N.J. 522, 279 A.2d 640, 651 (1971). "The standard of conduct that the term 'unconscionable' implies is lack of 'good faith, honesty in fact and observance of fair dealing.'" *Cox*, 647 A.2d at 462 (quoting *Romain*, 279 A.2d at 652). Proof of any act or omission as specified by the statute is sufficient to establish unlawful conduct under the NJCFA. *Cox*, 647 A.2d at 462.

BASF argues that the evidence presented did not lead to a "connection with the sale or advertisement of any merchandise." N.J. Stat. Ann. 56:8-2. However, evidence was presented that BASF made material misrepresentations in advertisements. Moreover, the *Sugarbeet Grower* magazine article, efforts by BASF's sales representative to have off-label restrictions enforced, and BASF's less than candid responses to inquiries about Poast Plus' EPA registration showed efforts to prevent farmers from learning that Poast Plus was EPA approved for use on the same crops as Poast. Given the "broad business ethic" that the NJCFA is designed

to create, *Romain*, 279 A.2d at 651, there was competent evidence reasonably tending to sustain the verdict on liability.

B. Causation & Ascertainable Loss

BASF also would be entitled to JNOV if the farmers failed to establish that BASF's actions caused an ascertainable loss. *See Cox*, 647 A.2d at 464. To establish a violation under the NJCFA, a "causal relationship" must exist between the ascertainable loss and the unlawful practice. *Roberts v. Cowgill*, 316 N.J. Super. 33, 719 A.2d 668, 672 (1998). The NJCFA provides that an offense arises "whether or not any person has in fact been misled, deceived or damaged thereby." N.J. Stat. Ann. 56:8-2. Consumer fraud in New Jersey, in contrast with common law fraud, does not require a showing of reliance, merely a "causal relationship."[14] *Cox*, 647 A.2d at 464.

BASF argues that the farmers failed to prove BASF's actions caused an ascertainable loss because they failed to show that either they or other class members were ever aware of BASF's statements about Poast and Poast Plus and because the farmers' theory of causation, which BASF terms the "lost opportunity to boycott" Poast, is unsupportable as a matter of law. In *Peterson I*, the court of appeals held that a causal link between BASF's conduct and an ascertainable loss could be established based either on (1) the farmers' lost opportunity to choose whether to buy Poast or the lower-priced Poast

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[14] The jury was given the following instruction on causation:

> The basic question for you to resolve is whether the injury Plaintiffs claim are so connected with a violation of the New Jersey Consumer Fraud Act by BASF that you decide it is reasonable that Defendant should be held responsible for the injury.

Plus,[15] or (2) the lost opportunity to refuse to buy Poast if they had known that Poast Plus was EPA registered for the same uses as Poast. 618 N.W.2d at 824-25. In *Peterson II*, the court of appeals held that sufficient evidence had been presented at trial for a jury to find an ascertainable loss based on the farmers' lost opportunity to refuse to purchase Poast due to BASF's conduct or actions. 657 N.W.2d at 868.

The farmers' theory of causation is based on unconscionable commercial activities resulting in the farmers purchasing Poast, which had a weighted average price differential of approximately $4 per acre more than Poast Plus. In *Varacallo v. Massachusetts Mutual Life Insurance Co.*, the appellate division of the New Jersey Superior Court held that plaintiffs who purchased whole life insurance policies from an insurer met the requirements for class certification where plaintiffs alleged a knowing omission of material information under the NJCFA. 332 N.J. Super. 31, 752 A.2d 807, 817-19 (2000). The court stated that if the plaintiffs succeeded in showing that the insurance company withheld material information in literature with the intent that consumers would rely on it in purchasing an insurance policy, the purchase of the policy by a person who was shown the literature would

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[15] The court cited to a Minnesota case, *Sutton v. Viking Oldsmobile Nissan, Inc.*, 611 N.W.2d 60, 65 (Minn. App. 2000), as the basis for this "lost opportunity to buy" theory. *Sutton* was later vacated by this court and remanded to the court of appeals to consider in light of our decision on the Minnesota Consumer Fraud Act in *Group Health Plan, Inc. v. Philip Morris, Inc.*, 621 N.W.2d 2 (Minn. 2001). *Sutton v. Viking Oldsmobile Nissan, Inc.*, 623 N.W.2d 247, 247 (Minn. 2001). On remand, the court of appeals held that a genuine issue of material fact existed as to whether Sutton was damaged, neither affirming nor denying its prior reasoning. *Sutton v. Viking Oldsmobile Nissan, Inc.*, No. C2-99-1843, 2001 WL 856250 at *2 (Minn. App.), *rev. denied* (Minn. Oct. 24, 2001).

be sufficient to establish prima facie proof of causation because the NJCFA requires only a causal relationship, not reliance. *Id.* at 817.

Here, named plaintiffs, as representatives of the class of similarly situated farmers, testified that they had seen the allegedly misleading advertisements. The jury could infer from the advertisements and other evidence that but for BASF's unconscionable conduct, farmers in general would have discovered that Poast Plus was EPA registered for use on the same crops as Poast. Under the NJCFA, class members' awareness of advertisements may provide a sufficient causal nexus. *See Varacallo*, 752 A.2d at 817. The farmers also presented evidence that BASF's sales documents showed that around 1996, when BASF's actions were exposed to the public, sales for Poast in North Dakota, Minnesota, and elsewhere dropped off. Similarly, the farmers provided evidence that the price of Poast decreased around 1996-97. The farmers argued that BASF's actions from 1992 to 1996 made them unaware that Poast Plus was EPA approved for use on the same crops as Poast, and had this been known, pressure would have been placed on BASF to lower the price of Poast to the more competitive market price of Poast Plus. For example, the farmers could have refused to purchase Poast, or states could have issued special local needs registrations pursuant to FIFRA section 24(c) to allow for the use of Poast Plus on minor crops. The jury could infer from the evidence that BASF's actions had a "causal relationship" with the farmers purchasing Poast, which resulted in them suffering a loss.

Furthermore, the farmers' loss was ascertainable. Our review of the evidence presented leads us to conclude that the underlying economic facts of the case were not seriously in dispute. Both sides presented expert testimony on damages. The farmers claimed actual damages of $26,182,501 and the

jury awarded the farmers $15,000,000 in actual damages.[16] BASF argued damages by introducing demonstrative trial exhibits and presenting an expert witness who estimated potential liability per acre. BASF's final damage figures varied from the figures presented by the farmers,[17] but once the jury determined BASF's liability, the evidence of an ascertainable loss by measurable money damages was clear. *See Cox*, 647 A.2d at 464 (holding an ascertainable loss existed where unlawful practice committed by failing to have periodic inspections in a home repair contract caused unsafe wiring and unattractive cabinets, which loss could be measured by repairing those conditions). The actual damage award was a factual determination by the jury.

We conclude there was competent evidence in the record reasonably tending to sustain the verdict when the evidence is viewed in the light most favorable to the nonmoving party. A judgment in favor of BASF as a matter of law would not be appropriate and the verdict was not manifestly against the weight of the entire evidence of liability, causation, and as-

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[16] The jury was instructed on damages and ascertainable loss of money and further that "the price charged is only one factor in your consideration * * *." The jury was also instructed that the damage award would be trebled and reasonable attorney fees would be awarded pursuant to New Jersey law.

[17] We note, though, that the Director of Coastal Business Area for BASF submitted an affidavit stating that he had reviewed sales records for the sale of Poast and Poast Plus for the period 1992-1996 and determined that the weighted average price differential between the two products for that period was approximately $4 per acre. This price differential is close to the price differential used by the farmers' expert, illustrating that the underlying economic facts were not seriously in dispute. BASF's damage expert estimated the farmers' actual damage at $7,251,417.

certainable loss. We affirm the court of appeals and hold that BASF is not entitled to JNOV.

Affirmed.

PAGE, J., took no part in the consideration or decision of this case.

Court of Appeals of Minnesota.

RONALD PETERSON, ET AL.,
individually and on behalf of
all others similarly situated, Appellants,

v.

BASF CORPORATION,
foreign corporation, Respondent.

No. CX-00-737.

Nov. 14, 2000.

Review Denied Jan. 26, 2001.

Considered and decided by KLAPHAKE, Presiding Judge, LANSING, Judge, and SCHUMACHER, Judge.

OPINION

KLAPHAKE, Judge

Appellants brought this New Jersey Consumer Fraud Act claim for fraudulent and unconscionable commercial conduct against respondent BASF Corporation, seeking damages for injuries resulting from BASF's marketing of two identical herbicides. The district court granted BASF's motion for summary judgment, concluding that appellants failed to show that there were any genuine issues of material fact. Because fact issues exist as to whether BASF's marketing was fraudulent or unconscionable commercial conduct under the New Jersey Consumer Fraud Act, we reverse and remand.

FACTS

Appellants, a group of farmers who grow minor crops such as sugar beets and sunflowers, brought this class action against respondent BASF. BASF is incorporated under Delaware law and is headquartered in New Jersey. Among other enterprises, BASF markets and sells agricultural herbicides nationwide. Two of these herbicides, "Poast" and

"Poast Plus," are sold for crops such as flax, beans, sugar beets, sunflowers, alfalfa, and potatoes.

On December 15, 1997, appellants filed suit claiming that BASF engaged in consumer fraud by marketing one herbicide as two different products, selling Poast to them at a premium price, and leading them to believe the less expensive Poast Plus had not been registered with the EPA for use on minor crops.

As support for their claims, appellants presented evidence showing that BASF used different formulation and application instructions on Poast and Poast Plus labels, even though both contained the same active ingredient. BASF then undertook an advertising campaign to stress the fact that Poast was the only product registered for minor crops. In particular, BASF listed Poast Plus in its product brochure as only registered for use on major crops, and mailed farmers a letter stating that Poast Plus should be limited to major crops to "avoid residue problems." BASF also engaged in a national public relations campaign to stress that use of Poast Plus on minor crops was unlawful and harmful to man and the environment. For example, BASF (1) sent a position paper stating that off-label use of Poast Plus would result in hefty fines; (2) was involved in an article stating that off-label use can be dangerous to consumers and the environment; (3) proceeded to report off-label use of Poast Plus to state regulatory authorities, resulting in some farmers being criminally prosecuted; and (4) misled state agriculture officials about the EPA registration status of Poast Plus.

On March 1, 2000, the district court granted BASF's motion for summary judgment and dismissed appellants' New Jersey Consumer Fraud Act claims. This appeal followed.

ISSUES

1. Did the district court properly grant summary judgment, where BASF's exacting of higher prices from farmers

by exploiting the federal herbicide registration process raised genuine issues of material fact?

2. Did the district court abuse its discretion in certifying appellants as a class?

ANALYSIS

I.

Summary judgment is properly granted when there are no genuine issues of material fact and either party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. On appeal, "we view the evidence in the light most favorable to the party against whom summary judgment was granted." *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995) (citation omitted). "Any doubt as to whether issues of material fact exist is resolved in favor of the party against whom summary judgment was granted." *Id.* (citation omitted).

Appellants' claims against BASF are based on the New Jersey Consumer Fraud Act. The purpose of the act "is aimed basically at unlawful sales and advertising practices designed to induce consumers to purchase merchandise or real estate." *Daaleman v. Elizabethtown Gas Co.*, 77 N.J. 267, 390 A.2d 566, 568 (1978). The act provides:

> The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice[.]

N.J. Stat. Ann. § 56:8-2 (West 1989). The New Jersey Supreme Court has defined "unconscionable" as

> an amorphous concept obviously designed to establish a broad business ethic. The standard of conduct that the term unconscionable implies is lack of good faith, honesty in fact and observance of fair dealing.

Cox v. Sears Roebuck & Co., 138 N.J. 2, 647 A.2d 454, 462 (1994) (quotations and citations omitted).

Appellants alleged that BASF unconscionably exploited the regulatory standards and overtly deceived and lied to farmers to conceal the fact that the less expensive Poast Plus was registered with the EPA for the same crops as Poast. The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) requires herbicides to be registered with the Environmental Protection Agency (EPA). 7 U.S.C. § 136a (1994 & Supp. IV 1998). Through this registration process the EPA also regulates the labeling and packaging of herbicides. *Id.* This process begins with the manufacturer receiving authorization from the EPA to register the herbicide for use on certain crops. FIFRA then allows the states to require the manufacturer to receive state registration to use the herbicide on certain crops. Appellants alleged that BASF designed a plan to limit the state registration of Poast Plus.

In 1992, BASF received authorization from the EPA to register Poast Plus for all the uses it currently held for Poast, which included both major and minor crops. BASF proceeded to register Poast Plus with the states for use only on major crops. BASF's registering of one herbicide for use on different crops was specifically permitted by the EPA. 40 C.F.R. § 152.130(b) (1994). Appellants presented evidence, however, to suggest that BASF designed a plan to conceal the fact that Poast Plus was EPA registered for use on minor crops and to discourage any off-label use of Poast Plus. That evidence consisted of BASF's (1) involvement in publishing

articles and newsletters discouraging the use of Poast Plus on minor crops; (2) encouragement of criminal prosecutions for off-label use; and (3) actions in lying to state regulatory authorities about the registration status of Poast Plus. Thus, appellants have shown that a genuine issue of material fact exists as to whether BASF's system of deceit falls within the broad protection of the New Jersey Consumer Fraud Act.

BASF argues that even if there is a basis under this act, appellants are barred due to their inability to show damages. See N.J. Stat. Ann. § 56:8-19 (West Supp. 2000) (under New Jersey Consumer Fraud Act, party seeking to recover damages must suffer "any ascertainable loss of moneys or property * * * as a result of the use or employment * * * of any method, act, or practice declared unlawful under this act"); *Meshinsky v. Nichols Yacht Sales, Inc.*, 110 N.J. 464, 541 A.2d 1063, 1068 (1988) (precluding private cause of action under New Jersey Consumer Fraud Act, where no ascertainable loss shown).

BASF relies on the federal labeling law to claim that appellants cannot show damages. BASF argues that even if appellants knew that Poast Plus was federally registered for the same uses as Poast, they could not have used Poast Plus on their minor crops because it was not labeled for such use. *See* 7 U.S.C. § 136j(a)(2)(G) (1994) (once herbicide is labeled for specific use "[i]t shall be unlawful for any person * * * to use any registered [herbicide] in a manner inconsistent with its labeling"). BASF's focus is misplaced, however, because appellants' claim is based on their lost opportunity to choose whether to buy Poast or the identical, but four dollars per acre cheaper, Poast Plus. This type of a lost opportunity or financial detriment may be sufficient to prove damages.

In *Sutton v. Viking Oldsmobile Nissan, Inc.*, 611 N.W.2d 60 (Minn. App. 2000), a case brought under the Minnesota Prevention of Consumer Fraud Act, this court reversed the

district court's determination that no damages had been shown, where

> [the plaintiff] testified that if he had known the extent of [the defendant's] profit on the service contract, he would have negotiated a lower price or refused to buy it. [The plaintiff] therefore either overpaid for the service contract or lost the opportunity to refuse to buy it because of the large profit [the defendant] would make on it.

Id. at 65.

Similarly, in this case appellants claim that they lost the opportunity to refuse to buy Poast because BASF's marketing scheme and exploitation of federal regulations concealed that Poast Plus was registered for the same uses as Poast. Appellants' reactions when they learned of BASF's scheme constitute circumstantial evidence that these farmers would not have stood idly by and paid inflated fees to BASF.

We therefore conclude that the issues of whether BASF's actions rise to the level of fraud or an unconscionable commercial practice under the New Jersey Consumer Fraud Act are issues for a jury to decide. The district court's grant of summary judgment is reversed and the matter is remanded for further proceedings.

II.

BASF also filed a notice of review, challenging the certification of appellants as a class for purpose of their claims under the New Jersey Consumer Fraud Act. District courts have considerable discretionary power to determine whether a class action is maintainable. *Streich v. American Family Mut. Ins. Co.*, 399 N.W.2d 210, 213 (Minn. App. 1987), *review denied* (Minn. Mar. 25, 1987) (citing *Forcier v. State Farm Mut. Auto. Ins. Co.*, 310 N.W.2d 124, 130 (Minn. 1981)).

To represent a class in Minnesota, appellants first must satisfy prerequisites of number and common question, and show that the issues are typical and representative of the class. Minn. R. Civ. P. 23.01.

Number

BASF does not dispute that the class is so numerous that joinder is impractical.

Common Questions

"The threshold for [common questions] is not high and requires only that the resolution of the common questions affect all or a substantial number of class members." *Streich*, 399 N.W.2d at 214 (citation omitted). Appellants allege that the common questions of law and fact include: (1) whether BASF's alleged marketing practices violated the New Jersey Consumer Fraud Act; and (2) the amount of damages incurred by potential claimants. The district court did not abuse its discretion in determining that sufficient common questions exist.

Issues Representative and Typical of Class

"The remaining prerequisites are often viewed as a two-pronged approach 'intended to insure that the claims of the class members are fully presented and vigorously prosecuted.'" *Id.* at 215 (citation omitted).

Typical issues focus on the representative parties and examine whether the parties "have an interest compatible with that of the class sought to be represented." *Ario v. Metropolitan Airports Comm'n*, 367 N.W.2d 509, 513 (Minn. 1985) (citation omitted). The typical issues requirement "refers to the potential for rivalry and conflict which may jeopardize the interests of the class." *Id.* The district court did not abuse its discretion in determining that no such tension likely would occur in this case.

The representative issue requirement means the representative parties' "interests must coincide with the interests of other class members" and the parties and their counsel will "competently and vigorously prosecute the lawsuit." *Id.* (citation omitted). The district court did not abuse its discretion in determining that appellants' counsel is competent to represent the class. Thus, the requirement of representation is satisfied.

Once appellants have satisfied the four prerequisites of rule 23.01, they must show that their proposed class meets one of the requirements of Minn. R. Civ. P. 23.02. Rule 23.02(c) requires a court to find that common questions predominate over individual questions and that a class action provides a superior method of adjudicating the controversy.

> To determine whether common questions of law or fact predominate over individual questions, the court must consider the elements which the plaintiff must establish in order to recover on the claim against the defendant. To predominate, common issues must constitute a significant part of the individual cases.

Streich, 399 N.W.2d at 217 (citation omitted).

Factors to consider in this analysis include "manageability, fairness, efficiency, and available alternatives." *Id.* at 218 (citation omitted). "The purpose of the class action has been to take 'care of the smaller guy.'" *Id.* (citing *Dolgow v. Anderson*, 43 F.R.D. 472, 485 (E.D.N.Y. 1968)). The class action is most often needed in consumer suits where individual claims are small. *Forcier*, 310 N.W.2d at 130. "[W]here the potential recovery is too small to justify individual litigation, a class action is proper." *Id.* (citing *Rathbun v. W.T. Grant Co.*, 300 Minn. 223, 241-42, 219 N.W.2d 641, 653 (1974)).

In *Rathbun*, the plaintiffs brought a class action to declare the defendant's installment credit plan usurious. The district

court limited the class action to the single issue of usury and further limited the action to the question of liability, exclusive of damages. The supreme court concluded that the class action was a superior method of promoting the public purpose of the usury statute, which was designed to protect those who cannot protect themselves. The court concluded:

> All members of the class are entitled to recover the interest charged them. It is unreasonable to assume that they will all litigate individually their just claims.

Id. at 241-42, 219 N.W.2d at 653.

Although management problems inhere in any class action, the district court is vested with broad powers to alleviate any procedural problems which may arise. *Forcier*, 310 N.W.2d at 130. The reasoning of *Rathbun* applies equally to promoting the public purpose of consumer fraud statutes to protect those who cannot protect themselves. We therefore conclude that the district court did not abuse its discretion in certifying appellants as a class on their New Jersey Consumer Fraud Act claim.

DECISION

The district court's grant of summary judgment is reversed and the matter is remanded for further proceedings.

Affirmed in part, reversed in part, and remanded.

STATE OF MINNESOTA
COUNTY OF NORMAN

IN DISTRICT COURT
NINTH JUDICIAL DISTRICT

RONALD PETERSON, BARRY THUNE, OWEN LARSON, OWEN LARSON FARMS, INC., DUANE EVENSON, JEFFREY NESVIG, RICHARD MOEN, CHRISTOPHER GROVE, CHRISTOPHER GROVE FARMS, INC., DAVID ABENTROTH, GLENN ASBECK, ASBECK, INC., DONALD STEINBEISSER, JOE G. STEINBEISSER & SONS, INC., STEPHEN PUST, AND STEPHEN Pust FARMS, INC.,
individually and on behalf of all others similarly situated, Plaintiffs,

vs.

BASF CORPORATION,
a foreign corporation, Defendant.

ORDER GRANTING SUMMARY JUDGMENT

Court File No. C2-97-295

In January of 1999, the Defendant brought three motions for Summary Judgment in the above-entitled matter, labeling claims, representations to the Department of Agriculture, and all remaining claims. The Court deferred its decision until discovery had been completed. Discovery was completed February 4, 2000.

On February 18, 2000, the Defendant brought a summary judgment motion regarding the Plaintiffs' New Jersey Consumer Fraud Claims. Present at the hearing in the Norman County Courthouse, Ada, Minnesota were:

Hugh Plunkett, PLUNKETT, SCHWARTZ & PETERSON, and Douglas Nill, Esquire, appearing by and on behalf of the Plaintiffs.

Brian O'Neill, Jim O'Neal, Winthrop Rockwell, and Amy Freestone, FAEGRE & BENSON, Kenneth Johannson, JOHANNSON, RUST, FAGERLUND, YON & STOCK, and Moira Brophy, in-house counsel for BASF, appearing by and on behalf of the Defendant.

Being advised in the premises, IT IS HEREBY ORDERED:

1. That Defendant's motions for summary judgment are HEREBY GRANTED.
2. All Counts in the Second Amended Class Action Complaint are dismissed with prejudice and all matters, including pre-trial matters, are hereby stricken from the Court's calendar.
3. All other motions brought February 18, 2000, in the above-entitled Court file are hereby DENIED.

The attached memorandum is made a part hereof.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

DATE: MARCH 1, 2000

/S/ MICHAEL J. KRAKER
Michael J. Kraker
Judge of the District Court

DATE: MARCH 1, 2000

The above Conclusions of Law constitute the Judgment of the Court.

Gordon K. Bahner
Court Administrator

BY: /S/ GORDON K. BAHNER

MEMORANDUM

The relevant facts in the instant case appear to be the following:

1. BASF Corporation, Defendant, is incorporated under the laws of Delaware and is headquartered in the State of New Jersey. BASF manufactured, marketed and sold the herbicides, Poast® and Poast Plus®, from January 1992 to January 1997, in the national agricultural market.

2. The Plaintiffs purchased Poast® between January 1992 and January 1997.

3. To sell herbicides in the national agricultural market the herbicide must be registered at both the Federal level, the Environmental Protection Agency ("EPA"), and, the State level, departments of agriculture for that state. The product must also be labeled by the manufacturer as to what crops the product is registered for.

4. Poast® and Poast Plus® were registered as separate products with the EPA, with different registration numbers and separate and distinct compositions.

5. Poast® and Poast Plus® share the same active ingredient base, Sethoxydim.

6. Poast® and Poast Plus® were registered with the EPA for use on "major crops": such as peanuts, cotton, soybeans & alfalfa, and, "minor crops": such as sugar beets, sunflowers, dried beans, flax and potatoes, among others.

7. The Defendant registered Poast® for use on both "major" and "minor" crops with the state departments of agriculture.

8. The Defendant registered Poast Plus® for use on "major" crops with state departments of agriculture, but, Defendant did not register Poast Plus® with any of the fifty state departments of agriculture for use on "minor" crops.

9. Poast Plus® was labeled for use only on "major" crops. The label did not indicate that it was registered with the EPA for sugarbeets, sunflowers, dried beans, flax or potatoes, "minor crops."

10. From January 1, 1992 until January 1, 1997, Poast® was higher priced than Poast Plus® on an active ingredient per acre basis.

11. Plaintiffs could have been prosecuted for using Poast® or Poast Plus® "off label," i.e. using either pesticides in a manner inconsistent with the label.

12. Plaintiffs admitted and affirmed that they are not making a labeling claim.

13. Plaintiffs admitted and affirmed that they are not making a price-discrimination claim.

14. The Plaintiffs seek compensation from the Defendant for fraudulent and unconscionable commercial conduct through its marketing of Poast® and Poast Plus® in violation of the New Jersey Consumer Fraud Act, pursuant to N.J.Stat.Ann. § 56:8.1 et seq.

Defendant asserts there are no genuine issues of material fact and are therefore entitled to judgment as a matter of law.

Summary judgment is to be granted if an examination of the pleadings, depositions, answers, admissions and affidavits on file show that there are no genuine issues as to any material fact, and either party is entitled to judgment as a matter of law. Rule 56.03, Minn. R. Civ. P.; *Mutual Service Life vs. Galaxy Builders*, 435 N.W.2d 136 (Minn. App.

1989). A "material fact" is a fact whose resolution will affect the result of the outcome of the case. *Borg Warner v. Shakopee Sports Center*, 431 N.W.2d 539, 540 (Minn. 1988). The facts presented must support the essential elements of the case, *Celotex*, 477 U.S. at 322, because the substantive law identifies the material facts. *Anderson vs. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To survive a motion for summary judgment, the nonmoving party must show a genuine issue of material fact. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. 574, 585 (1986); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1989). The nonmoving party cannot, when a motion for summary judgment is supported by affidavits, rely on general allegations of fact. *Erickson v. General United Life Insurance Company*, 256 N.W.2d 255 (Minn. 1977). Specific facts beyond the pleadings must be shown. *Matsushita*, 475 U.S. at 586; *Celotex Corp. vs. Catrell*, 477 U.S. 317, 324 (1986); *Carlisle vs. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. Ct. App. 1989). Some metaphysical doubt as to a material fact is not enough to prevent summary judgment; a "scintilla" of evidence is insufficient to resist summary judgment, as is "merely colorable" evidence. *Anderson*, 477 U.S. at 247-50; *Matsushita*, 475 U.S. 574, 586 (1986); *Carlisle*, 437 N.W.2d at 715. The court in *Bob Useldinger & Sons v. Hangsleben*, 505 N.W.2d 323, 328-329 (Minn. 1993) stated:

> "Mere speculation without some concrete evidence is not enough to avoid summary judgment... [The evidence] must have some foundation other than mere conjecture." (citations omitted)

The court's sole role is to determine whether an issue of established material fact exists. *Marose v. Hennameyer*, 347 N.W.2d 509 (Minn. App. 1984). The court views the evidence in the light most favorable to the nonmoving party.

American Druggists Ins. v. Thompson Lumber Co., 349 N.W.2d 569 (Minn. App. 1984).

When there are no disputed facts in existence, but there is a dispute in application of law to those facts, summary judgment is proper. *Fire & Cas. Ins. Co. of Connecticut v. Illinois Farmers Ins. Co.*, 352 N.W.2d 798 (Minn. App. 1984).

Plaintiffs have failed to show that there are any genuine issues of material fact, which preclude the granting of summary judgment. Therefore, summary judgment is proper.

The parties are in agreement that the Plaintiffs are not alleging a Labeling claim.[1] Therefore, the Court will not discuss preemption under 7 U.S.C. § 136v(b). Summary judgment on the labeling claims is granted.

The parties are also in agreement that the Plaintiffs are not alleging a Price Discrimination claim.[2] Therefore, the Court will not discuss whether price discrimination is actionable under Minnesota, Delaware or New Jersey law. Summary judgment on the price discrimination claims is granted.

The remaining issue before the Court is whether the Plaintiffs have a claim under the New Jersey Consumer Fraud Act for fraudulent and unconscionable commercial conduct through its marketing of Poast® and Poast Plus®.

The Plaintiffs' claims are based on New Jersey Revised Statute 56:8-1, which makes unlawful:

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[1] Based on Defendant's Motion for Summary Judgment on Labeling Claims, and Plaintiffs' reply to the Defendant's Summary Judgment motions on February 18, 2000, Mr. Douglas Nill reiterated that Plaintiffs are not asserting a labeling claim.

[2] Argument for Summary Judgment on the New Jersey Consumer Fraud claims, February 18, 2004. Defendant asserts that the Plaintiffs have no basis for a price discrimination claim and Plaintiffs agree they are not bringing a price discrimination claim.

> [t]he act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice; provided, however, that nothing herein contained shall apply to the owner or publisher of newspapers, magazines, publications or printed matter wherein such advertisement appears, or to the owner or operator of a radio or television station which disseminates such advertisement when the owner, publisher, or operator has no knowledge of the intent, design or purpose of the advertiser.

The purpose of the act is to prevent the deception and fraud, whether by actual "acts," or "omissions," in connection with sales or advertising of merchandise. *Cox v. Sears Roebuck & Co.*, 647 A.2d 454, 562 (N.J. 1994).

The Plaintiffs allege the Defendant has committed fraud and persisted in unconscionable commercial practices. The New Jersey courts define "unconscionable commercial practices" as a lack of "good faith, honesty in fact and observance of fair dealing." *Kugler v. Romain*, 58 N.J. 522, 279 A.2d 640 (1971). The Plaintiffs claim that Defendant committed fraud and unconscionable commercial practices in:

1. intentionally failing to notify the consumer and state departments of agriculture that Poast Plus® was registered with the EPA for use on minor crops;

2. publishing articles averring that it is illegal to use its products "off-label"; and,

3. marketing Poast Plus® and Poast®, two products that share the same active ingredient, as different products for different prices.

The Defendant asserts that their actions are permitted under federal regulations.

According to 7 U.S.C. § 136a, "no person in any State may distribute or sell to any person any pesticide that is not registered" under subchapter 136a. The Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") granted the EPA authority to regulate pesticide's labeling to ensure their compliance with the goals of FIFRA.[3] Once a pesticide has been approved by the EPA for distribution or sale, the pesticide is only marketable if it is also registered with the state it is to be sold in. 7 U.S.C. § 136v (states may regulate the sale or use of federally registered pesticides, so long as the states' conditions are not different from or in addition to those set by the EPA). Poast Plus® was never registered with any state for use on minor crops, it was only registered with the EPA. Poast® was registered for "major" and "minor" crops with the EPA and with state departments of agriculture.

Once a product is registered with the EPA, 40 C.F.R. § 152.130 et seq. allows registrants flexibility in labeling their products. If the product is registered with the EPA for a variety of uses, the product may be subset labeled for any of the approved uses, as long as "no changes would be necessary in precautionary statements, use classification, or packaging of the product." The Defendant has the right to chose whether or not to label Poast Plus® for use on minor crops. Had the Defendant labeled Poast Plus® for use on minor crops it would have been required to register with the state department of agriculture in the intended state of distribution.

---

[3] The goal of FIFRA to ensure proper labeling and minimal harm to the environment.

Defendant would be in violation of state law in labeling a pesticide that is not registered with the state. The Defendant's continued insistence that farmers were unable to use Poast Plus® for minor crops because it was not labeled for them, is not fraudulent, nor is it unconscionable. It would be illegal under federal law and state law to use a pesticide inconsistent with its label.[4] The Defendant does not have a duty to notify every consumer and every state department of agriculture whether their product has been registered with the EPA if they do not intend to register it with the state.[5]

The Plaintiffs have suffered no ascertainable loss as a result of Defendant's failure to disclose the crops Poast Plus® was registered for with the EPA. Had the Defendant disclosed that Poast Plus® was registered for minor crops with the EPA, Plaintiffs would still not have been able to use the product. Plaintiffs allege departments of agriculture for all fifty states would have registered for a 24(c)[6] to allow their farmers to use Poast Plus® off label. With the exception of Noah Dakota and South Dakota the Plaintiffs have failed to show that all states would have applied for and the EPA would have issued a 24(c) for price disparities. *O'Neil v. Kelly*, 239 N.W.2d 231, 232 (1976) (adverse party "may not rely on the possibility that he will be able to develop evi-

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[4] 40 C.F.R. § 156.10. It is illegal in all fifty states to use, sell, or advertise a pesticide that is not registered in that state.

[5] 7 U.S.C. § 136, et seq.

[5] 40 C.F.R. § 156.10.

[6] Under Section 24(c) of FIFRA the federal government may grant states authority to issue special local needs registrations under certain conditions. Certain conditions must exist before the EPA will grant a 24(c) registration, and even then the EPA may disapprove the application. 40 C.F.R. § 162.151.

dence at trial, but must present specific admissible facts showing a material fact issue").

Plaintiffs' allegations that the Defendant published articles informing consumers that it is illegal to use the products in question "off label" use is not actionable. The Plaintiffs are not allowed to use pesticides off label; this is a true statement.[7] The statements do not constitute fraud or unconscionable commercial practices.

The Plaintiffs allege Poast® and Poast Plus® are the same product. Defendants, only for the purpose of the summary judgment motion, have agreed that the two products are the same. 40 C.F.R. § 152.113 allows manufacturers to register pesticide products with the same active ingredients, as separate products. The EPA issued separate registration numbers to Poast® and Poast Plus® considering them distinct compositions. This Court will not second-guess the EPA's decision.

Plaintiffs' allegations are not actionable under the New Jersey Consumer Fraud Act.

Based on the above reasoning and authority, this Court Hereby Grants Defendant's motions for summary judgment.

MJK

STATE OF MINNESOTA AMENDED JUDGMENT

Ronald Peterson, et al., Respondents, vs. BASF Corporation, a foreign corporation, Appellant	Supreme Court Appellate Court C3-02-857 Trial Court # C297295

Pursuant to a decision of Supreme Court duly made and entered, it is determined and adjudged that the decision of the Norman County District Court herein appealed from be and the same hereby is affirmed and judgment is entered accordingly. A certified copy of the entry of judgment and the court's decision is herewith transmitted and made part of the remittitur.

It is further determined and adjudged that Ronald Peterson, et al. herein, have and recover of BASF Corporation herein the amount of $825,055.78 as attorney fees in this cause.

It is further determined and adjudged that Ronald Peterson, et al. herein, have and recover of BASF Corporation herein the amount of $35,930.84 as costs and disbursements in this cause, and that execution may be issued for the enforcement thereof.

Dated and signed: *June 19, 2006*	*FOR THE COURT* *Attest: Frederick K. Grittner* *Clerk of the Appellate Courts* *By: /s/ illegible* *Assistant Clerk*

Statement For Judgment

Costs and Disbursements in the Amount of: $35,930.84

Attorney Fees in the Amount of: $825,055.78

Other:

Total: $ 860,986.62

Satisfaction of Judgment filed: _____
Dated

Therefore the above judgment is duly satisfied in full and discharged of record

Attest: *Frederick K. Grittner* *By:* _____
Clerk of the Appellate Courts *Assistant Clerk*

STATE OF MINNESOTA **SUPREME COURT**

TRANSCRIPT OF JUDGMENT

I, Frederick K. Grittner, Clerk of the Appellate Courts, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my signature at the Minnesota Judicial Center,

In the City of St. Paul *June 19, 2006*
Dated

Frederick K. Grittner
Clerk of the Appellate Courts

By: */s/ illegible*
Assistant Clerk

STATE OF MINNESOTA **JUDGMENT**

Ronald Peterson, et al., Respondents, vs. BASF Corporation, a foreign corporation, Appellant	Supreme Court Appellate Court C3-02-857 Trial Court # C297295

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In the City of St. Paul *June 19, 2006*

Dated

Frederick K. Grittner

Clerk of the Appellate Courts

By: */s/ illegible*

Assistant Clerk

United States Constitution, Article VI

This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the constitution of laws of any State to the contrary notwithstanding.

* * *

United States Constitution, First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

* * *

7 U.S.C. § 136a(a), (c)(5). Registration of pesticides

(a) Requirement of registration

Except as provided by this subchapter, no person in any State may distribute or sell to any person any pesticide that is not registered under this subchapter. To the extent necessary to prevent unreasonable adverse effects on the environment, the Administrator may by regulation limit the distribution, sale, or use in any State of any pesticide that is not registered under this subchapter and that is not the subject of an experimental use permit under section 136c of this title or an emergency exemption under section 136p of this title.

* * *

(c) Procedure for registration

* * *

(5) Approval of registration

The Administrator shall register a pesticide if the Administrator determines that, when considered with any restrictions imposed under subsection (d) of this section —

(A) its composition is such as to warrant the proposed claims for it;

(B) its labeling and other material required to be submitted comply with the requirements of this subchapter;

(C) it will perform its intended function without unreasonable adverse effects on the environment; and

(D) when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.

* * *

7 U.S.C. § 136j(a)(1), (2)(G). Unlawful acts

(a) In general

(1) Except as provided by subsection (b) of this section, it shall be unlawful for any person in any State to distribute or sell to any person —

(A) any pesticide that is not registered under section 136a of this title or whose registration has been canceled or suspended, except to the extent that distribution or sale otherwise has been authorized by the Administrator under this subchapter;

(B) any registered pesticide if any claims made for it as a part of its distribution or sale substantially differ from any claims made for it as a part of the statement required in connection with its registration under section 136a of this title;

(C) any registered pesticide the composition of which differs at the time of its distribution or sale from its composition

as described in the statement required in connection with its registration under section 136a of this title;

(D) any pesticide which has not been colored or discolored pursuant to the provisions of section 136w(c)(5) of this title;

(E) any pesticide which is adulterated or misbranded; or

(F) any device which is misbranded.

(2) It shall be unlawful for any person —

* * *

(G) to use any registered pesticide in a manner inconsistent with its labeling

* * *

7 U.S.C. § 136v(a)-(b). Authority of States

(a) In general

A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

(b) Uniformity

Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

* * *

40 C.F.R. § 152.130(a)-(b). Distribution under approved labeling

(a) A registrant may distribute or sell a registered product with the composition, packaging and labeling currently approved by the Agency.

(b) A registrant may distribute or sell a product under labeling bearing any subset of the approved directions for use, provided that in limiting the uses listed on the label, no changes would be necessary in precautionary statements, use classification, or packaging of the product.

* * *

40 C.F.R. § 156.10(a)(1). Labeling requirements

(a) General —

(1) Contents of the label. Every pesticide products shall bear a label containing the information specified by the Act and the regulations in this Part. The contents of a label must show clearly and prominently the following:

(i) The name, brand, or trademark under which the product is sold as prescribed in paragraph (b) of this section;

(ii) The name and address of the producer, registrant, or person for whom produced as prescribed in paragraph (c) of this section;

(iii) The net contents as prescribed in paragraph (d) of this section;

(iv) The product registration number as prescribed in paragraph (e) of this section;

(v) The producing establishment number as prescribed in paragraph (f) of this section;

(vi) An ingredient statement as prescribed in paragraph (g) of this section;

(vii) Hazard and precautionary statements as prescribed in subpart D of this part for human and domestic animal hazards and subpart E of this part for environmental hazards.

(viii) The directions for use as prescribed in paragraph (i) of this section; and

(ix) The use classification(s) as prescribed in paragraph (j) of this section.

* * *

New Jersey Consumer Fraud Act § 56:8-2. Fraud, etc., in connection with sale or advertisement of merchandise or real estate as unlawful practice

The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice; provided, however, that nothing herein contained shall apply to the owner or publisher of newspapers, magazines, publications or printed matter wherein such advertisement appears, or to the owner or operator of a radio or television station which disseminates such advertisement when the owner, publisher, or operator has no knowledge of the intent, design or purpose of the advertiser.

(4)

No. 06-144

FILED

OCT 11 2006

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

BASF CORPORATION,

Petitioner,

v.

RONALD PETERSON, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Minnesota

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In *Peterson v. BASF Corp.*, 675 N.W.2d 57 (Minn. 2004) (*Peterson III*), the Minnesota Supreme Court affirmed the April 2, 2002 jury verdict judgment for Respondents (Farmers), ruling that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) – a health and safety law – does not preempt Farmers' "fraudulent marketing" claim.

On May 2, 2005, Case No. 04-81, this Court remanded Petitioner BASF Corporation's (BASF) challenge to *Peterson III* "for further consideration in light of *Bates v. Dow AgroSciences, LLC*," 544 U.S. 431 (2005) (state claims addressing marketing responsibilities of pesticide sellers to consumers are not preempted by FIFRA).

The Questions Presented:

1. Did the Minnesota Supreme Court, applying *Bates* to BASF's "fraudulent marketing" scheme while viewing the full trial record, err in reaffirming the jury verdict judgment?

   No. *Peterson v. BASF Corp.*, 711 N.W.2d 470, 479 (Minn. 2006) (*Peterson VI*), ("[F]armers' claims that BASF engaged in fraud, deception, and unconscionable conduct . . . are based on BASF's ***marketing and advertising*** actions and not on the content of the product labels."); *id.* at 481-82 ("the fundamental debate is simply about how the farmers' claims are ***accurately characterized*** . . . we conclude that the record supports the farmers' characterization of their claims"); *id.* at 481 (BASF's arguments have "***little credibility***").

QUESTIONS PRESENTED – Continued

2. Did the Minnesota Supreme Court err in rejecting BASF's moot and "procedurally waived" First Amendment argument on remand?

   No. *Peterson VI*, 711 N.W.2d at 474 ("As *Bates* only involved the issue of FIFRA preemption, we review only the preemption aspect of our decision in *Peterson III*."); *id.* at 482 (BASF's complaints about the Minnesota trial court's "evidentiary rulings or jury instructions" were "procedurally waived" by BASF after intermediate state appellate court ruling).

LIST OF PARTIES

1. Ronald Peterson
2. Barry Thune
3. Owen Larson
4. Owen Larson Farms, Inc.
5. Duane Evenson
6. Jeffrey Nesvig
7. Richard Moen
8. Christopher Grove
9. Christopher Grove Farms, Inc.
10. David Abentroth
11. Glenn Asbeck
12. Asbeck, Inc.
13. Donald Steinbeisser
14. Joe G. Steinbeisser & Sons, Inc.
15. Stephen Pust
16. Stephen Pust Farms, Inc.
17. All persons who purchased the herbicide Poast between January 1, 1992 and December 31, 1996 for use on their crops, except North Dakota residents who purchased Poast in North Dakota – who settled a separate class action lawsuit with BASF Corporation in 1997 for $3.5 million and national injunctive relief.
18. BASF Corporation

RULE 29.6 STATEMENT

Class Representatives include Owen Larson Farms, Inc., Christopher Grove Farms, Inc., Asbeck, Inc., Joe G. Steinbeisser & Sons, Inc., and Stephen Pust Farms, Inc. These small family-owned farm corporations, incorporated in the States of Minnesota and Montana, have no parent companies and no publicly-traded stock.

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DENY PETITION

The Court should deny BASF's injudicious second petition for certiorari.

BASF's petition ignores the *Bates* preemption test, 544 U.S. at 444, and the Minnesota Supreme Court's thorough analysis applied to BASF's fraudulent scheme. *Peterson VI*, Petitioner's Appendix (PA)1a: "[Farmers'] claims under the New Jersey Consumer Fraud Act are not preempted by [FIFRA], because they concern non-label deceptive statements and conduct and do not constitute a requirement for labeling or packaging."

BASF's first issue is misleading. The Environmental Protection Agency (EPA), under FIFRA, allows a company to container label a product for fewer than all registered uses ("split and subset labeling"), but plainly does not address fraudulent marketing schemes. *Peterson VI*, PA17a: "[F]armers' claims do not challenge the legality of BASF's subset [container] labeling, but rather its misrepresentations about the products. . . ." Nothing about the jury verdict requires BASF to do anything other than honestly market its product.

BASF's second issue is moot. BASF argues that isolated evidence of its fraudulent marketing scheme is protected commercial speech under the First Amendment. This trial "evidentiary ruling" argument, beyond the *Bates* remand, *Peterson VI*, PA5a, was "procedurally waived" by BASF after an intermediate state court appeal, PA19a.

OPINIONS BELOW

Twelve Minnesota appellate judges have studied the facts of this case as determined by the jury and unanimously and decisively rejected BASF's preemption and First Amendment arguments:

- *Peterson v. BASF Corp.*, 711 N.W.2d 470 (Minn. 2006) (*Peterson VI*) (reaffirming jury verdict judgment after remand from Supreme Court);
- *Peterson v. BASF Corp.*, 675 N.W.2d 57 (Minn. 2004) (*Peterson III*) (affirming jury verdict judgment);

- *Peterson v. BASF Corp.*, 657 N.W.2d 853 (Minn. App. 2003) (*Peterson II*) (affirming jury verdict judgment); and
- *Peterson v. BASF Corp.*, 618 N.W.2d 821 (Minn. App. 2000), *rev. denied* (Minn. 2001) (*Peterson I*) (remanding for trial).[1]

NO JURISDICTION FOR ISSUES WAIVED IN STATE COURT

This Court does not address issues procedurally waived by a petitioner in state court. The Minnesota Supreme Court on remand recognized that BASF's trial court "evidentiary rulings or jury instructions" issues were "procedurally waived" by BASF after *Peterson II*, an ***intermediate Minnesota appellate court ruling***. *Peterson VI*, PA19a. BASF's trial "evidentiary ruling" (First Amendment) and "jury instruction" (FIFRA requirements) issues in its petition for certiorari are beyond the review of this Court. *Stratton v. Stratton*, 239 U.S. 55 (1915) (if there is discretionary review by a higher court, the exercise of such discretion must be sought); *Matthews v. Huwe*, 269 U.S. 262, 265-66 (1925); R. Stern, E. Gressman, S. Shapiro, K. Geller, *Supreme Court Practice*, § 3.12, p. 165 (8th ed. 2002) ("If the judgment of the trial court is subject under state law to discretionary review by a higher court, such review must be sought.").[2]

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[1] Other opinions below, in state and federal court: *Peterson v. BASF Corp.*, A04-2464 (Minn. App. 2005) (*Peterson V*), *rev. denied* (Minn. 2005) (reversing jurisdiction ruling; declining to reach "merits" of BASF's "settlement" motion); *Peterson v. BASF Corp.*, A04-1553 (Minn. App. 2005) (*Peterson IV*), *rev. denied* (Minn. 2005) (jury verdict judgment was a "final . . . common fund" judgment ending BASF's interest); *Peterson v. BASF Corp.*, 12 F. Supp. 2d 964 (D. Minn. 1998) (*Peterson*) (remanding to state court).

[2] BASF also waived its trial "evidentiary" and "jury instruction" issues by never articulating a challenge to the *Peterson VI* "procedural waiver" ruling in its petition for certiorari. *See Adarand Constructors, Inc. v. Mineta*, 534 U.S. 102, 105, 110-11 (2001) (Court will not address standing when petition for certiorari did not contest lower court ruling

(Continued on following page)

SUMMARY ARGUMENT

A. Minnesota Supreme Court, Applying *Bates* to BASF's Fraudulent Marketing Schemes, Decisively Reaffirmed Jury Verdict Judgment

1. BASF's Fraudulent Marketing And Advertising

The Minnesota Supreme Court, applying *Bates* to BASF's "fraudulent marketing" scheme, decisively reaffirmed the jury verdict. *Peterson VI*, PA13a-14a ("...mers' claims that BASF engaged in fraud, deception, and unconscionable conduct ... are based on BASF's ***marketing and advertising*** actions and not on the content of the product labels.").

2. BASF Mis-Characterizes The Record

a. Pretends Jury Verdict Never Occurred

This case was tried to a 12-member jury over five weeks in November and December, 2001 with a unanimous finding that BASF engaged in "an unconscionable commercial practice, deception, fraud, false pretense, false promise, or misrepresentation in relation to BASF's ***marketing and pricing strategies***" and a "knowing omission, suppression or concealment of the truth" as part of its marketing scheme. Respondent Farmers' Appendix (RFA)1-3 (Dec. 6, 2001 Special Verdict Form).

b. Misrepresents The Facts

Upon viewing the full record, the Minnesota Supreme Court determined that BASF's appeals mis-characterize the record: "[T]he fundamental debate is simply about how the farmers' claims are ***accurately characterized*** ... we conclude that the record supports the farmers' characterization of their claims." *Peterson VI*, PA18a-19a;17a ([BASF's state registration and crop "safety ... testing"] arguments have "***little credibility***"); *see generally Supreme Court Practice*, § 6.30, p. 430

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that petitioner lacked standing); *Glover v. U.S.*, 531 U.S. 198, 205 (2001) (Court does not decide issues not articulated in petition for certiorari).

("Court relies heavily upon the good faith of petitioner's counsel in ***accurately stating . . . pertinent facts***").

c. Ignore's EPA's Conclusion It Has No Jurisdiction Over BASF's "Marketing" Scheme

Peterson III acknowledged the EPA's edict in this case that the EPA does not regulate company "marketing" of a herbicide – "***a [BASF] marketing decision in which the EPA had no input***." PA74a (emphasis added); PX82; PX334 ("***it is related to a marketing strategy and is not a regulatory matter***") (emphasis added).[3] No authority supports BASF's overzealous disregard of the EPA's statement in this case. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844-45 (1984) (court defers to agency's reasonable interpretation of statute it administers); *Mannheim Video, Inc. v. County of Cook*, 884 F.2d 1043, 1047 (7th Cir. 1989) ("ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist is . . . ***unprofessional***") (emphasis added).

d. Cannot Challenge Established Facts

BASF cannot challenge jury-established facts:

- ***Split/Subset Labeling And Different Trade Names For Same Product***: *Peterson VI*, PA17a ("***Based on the record*** . . . the farmers' claims do not challenge the legality of BASF's subset labeling [product container labeling for fewer than all EPA-registered uses], but rather its ***misrepresentations*** about the products. . . .") (emphasis added);
- ***Same product***: *Peterson VI*, PA17a ("***Based on the record***" . . . BASF's duty was to "refrain from deceptive [marketing] statements") (emphasis added);

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[3] PX82 is Farmers' Trial Exhibit 82 presented to the jury; a letter from EPA responding to a North Dakota Department of Agriculture inquiry. PX334 is Farmers' Trial Exhibit 334; a confidential internal BASF memorandum to BASF management stating the EPA was upset that BASF had deceived the North Dakota Pesticide Control Board.

Peterson III, PA71a ("***[E]vidence was presented*** that Poast and Poast Plus are essentially the same product . . . this evidence was presented to illustrate what the farmers alleged was a scheme to exploit the farmers through consumer fraud.");

- ***State Registration And Crop Safety:*** *Peterson VI*, PA17a-18a (BASF's argument bears "***little credibility . . . evidence was submitted*** [to the jury] that established that the choice in this case to limit state registration and availability of Poast Plus for use on minor crops was a marketing decision intended to maximize profits, not generated by safety concerns.") (emphasis added); *Peterson II*, PA38a ("There was ***clearly evidence*** . . . that BASF believed that Poast Plus had been sufficiently tested for use on minor crops.") (emphasis added); *id.* at PA39a (farmers presented evidence, including expert testimony, from which "***jury could [conclude]***" that BASF's state registration decisions were part of BASF's national system of deceit) (emphasis added).

See, e.g., Hernandez v. New York, 500 U.S. 352, 366 (1991) ("in the absence of exceptional circumstances, we . . . defer to state-court factual findings"); *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) ("[this Court] cannot . . . review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error").

3. Moot And Procedurally Waived Arguments

a. First Amendment Is Beyond *Bates* Remand

The Minnesota Supreme Court denied BASF's attempt to re-argue its First Amendment issue on remand. "As *Bates* only involved the issue of FIFRA preemption, we review only the preemption aspect of our decision in *Peterson III*." *Peterson VI*, PA5a.

b. Trial Evidentiary And Jury Instruction Rulings Were "Procedurally Waived" In State Court

The Minnesota Supreme Court rejected BASF's complaints about the trial court's "evidentiary rulings or

jury instructions" as "procedurally waived" in state court, *Peterson VI*, PA19a, including BASF's argument that isolated evidence before the jury of BASF's "less than candid responses" about the registration status of BASF's products was protected commercial speech. *Peterson III*, PA76a (emphasis added). This Court does not address issues procedurally waived in state court.

B. *Bates* And *Peterson* In A Nutshell

1. *Bates* Is A "Label" Case

Bates is a label-based product performance case: claims by farmers addressing the effectiveness of the product on the crop even though the EPA approved the product (container) label: (1) *crop safety claims* – the herbicide killed or injured the crop it was intended to protect; or (2) *efficacy claims* – the herbicide did not kill the weeds. Who is responsible? The EPA? The farmer who purchased a product that did not work? Or the company that sold the product for profit?

Before *Bates*, the coordinated chemical industry persuaded some courts to dismiss injured farmers' claims for the simplistic reason that the "EPA approved the label." Yes, the EPA approved the product (container) label in reliance upon the common-sense notion that a company would not seek EPA registration to sell a product that did not work. No, the EPA did not step into the shoes of the company and guarantee the effectiveness of the product and the honesty of the company's marketing campaign.

Label-based claims, like *Bates*, address the pesticide seller's sale of a product that did not work. The EPA, under FIFRA, only evaluates the safety of a pesticide (herbicide) as it affects people and the environment. Congress wrote FIFRA as a vehicle for the EPA to evaluate the relative safety of the product for people and the environment. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991-92 (1984). Congress has never granted the EPA authority to regulate or govern a pesticide seller's marketing and pricing schemes.

Bates clarifies that the EPA, under FIFRA, does not address the effectiveness of a product – whether it will work – as marketed by the company. *Bates* affirms that state claims addressing ***marketing responsibilities*** of pesticide sellers to consumers are not preempted by FIFRA.

2. *Peterson* Is An "Off-Label" Case

Well beyond the "label" claims in *Bates*, *Peterson* presents "off-label" claims of fraudulent "marketing and pricing."

Trial evidence established that BASF defrauded thousands of farmers by deceptively marketing the same herbicide as different products – Poast and Poast Plus – at different prices as a "system of deceit" to extract inflated prices for the same herbicide from minor crop farmers.

BASF concealed from farmers and state regulatory authorities that cheaper Poast Plus, sold to soybean growers, a "major" national crop, was approved by the EPA for use on the same crops as more expensive Poast sold to growers of "minor" crops such as sunflowers, sugarbeets, potatoes, vegetables and fruits. The EPA directly informed state regulatory officials, upon inquiry, that BASF's market-segmentation scheme was "***a company marketing decision in which the EPA had no input***." PA74a (emphasis added); PX82.

The jury found that BASF's misconduct was unconscionable. BASF lied to state regulatory authorities, food processors, farmers and dealers to conceal a federal regulatory action; namely, the EPA registration of Poast Plus for the same crops as Poast, using the same safety data. BASF threatened and encouraged the criminal prosecutions of farmers for "off-label" use of cheaper Poast Plus as a marketing "strategy." BASF considered the "***risk***" of farmers discovering the truth, and whether United States farmers could be "***controlled in future***" if BASF's fraudulent marketing and pricing schemes for Poast and Poast Plus were discovered.

3. "Label" Claims Are Not Preempted

As this Court said in *Bates*, 544 U.S. at 444:

> Rules that require manufacturers to design reasonably safe products, to use due care in conducting appropriate testing of their products, to market products free of manufacturing defects, and to honor their express warranties or other contractual commitments plainly do not qualify as requirements for "labeling and packaging."

Consumer fraud statutes, applied to fraudulent marketing schemes, likewise do not impose label "requirements" nor impede the EPA's mandate under FIFRA to evaluate the safety of products for people and the environment. Consumer fraud statutes only impose a duty upon global chemical companies to honestly market their product. *Peterson VI*, PA17a (***"duty ... to ... refrain from deceptive statements"***) (emphasis added). The unanimous *Peterson* jury, on December 6, 2001, found that BASF violated honesty in the marketing of its herbicide. Nothing about the jury verdict requires BASF to do anything other than honestly market its products.

4. "Off-Label" Claims Are Off The Radar Of Preemption

Fraudulent marketing representations – off-label claims – are far beyond FIFRA preemption. *Bates*, 544 U.S. at 444 n.17 ("To the extent that ... fraud claims are based on oral representations made by Dow's agents, they [***are not preempted***]."). The EPA through the Solicitor General acknowledged during the January 10, 2005 oral argument in *Bates* that fraudulent marketing representations are not preempted: "***[W]e agree that ... off-labeled, false misrepresentation[s] [are] ... not preempted.***" Tr. 43:4-7 (question by ***Justice O'Connor*** and response by Lisa S. Blatt, Esq., Assistant to the Solicitor General).[4]

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[4] *See* supremecourtus.gov/oral_arguments/argument_transcripts /03-388.pdf.

STATEMENT OF THE CASE

This is a consumer fraud case brought under the New Jersey Consumer Fraud Act (NJCFA), N.J. Stat. Ann. §§ 56:8-1-116 (1997), on behalf of farmers in all 50 states who purchased Poast herbicide from New Jersey-based BASF[5] in 1992-96. The class only exempts those North Dakota farmers who settled a separate class action lawsuit with BASF in 1997 for $3.5 million and national injunctive relief. *See, e.g.*, PX358 (***national reduction in price of Poast***).

BASF engaged in a national "system of deceit"– intentional misrepresentations, unconscionable commercial practices, and omissions – by marketing the same herbicide as different products – Poast and Poast Plus – to extract inflated prices from minor crop farmers.

- ***Peterson VI***, PA1a-24a ("[F]armers' claims that BASF engaged in fraud, deception, and unconscionable conduct . . . are based on BASF's ***marketing and advertising*** actions and not on the content of the product labels.") (emphasis added).
- ***Peterson III***, PA76a ("BASF made material misrepresentations in advertisements . . . [and engaged in many other] . . . efforts to prevent farmers from learning that Poast Plus was approved for use on the same crops as Poast.");
- ***Peterson II***, PA36a ("jury could conclude that BASF's marketing scheme and exploitation of federal regulations, rather than its lawful use of federal regulations, concealed that Poast and Poast Plus were registered for the same uses and constituted fraud under the NJCFA");
- ***Peterson I***, PA86a (remanding for a jury to determine whether BASF's herbicide marketing and pricing schemes deceived farmers and wrongfully exploited the federal EPA and state regulatory

[5] BASF is a subsidiary of a global chemical corporation, BASF Aktiengesellschaft (BASF AG), with gross yearly sales exceeding $55 billion.

process as a "system of deceit" to exact inflated prices from minor crop farmers).

A. BASF Engaged In A National "System Of Deceit" To Extract Inflated Prices From Minor Crop Farmers

BASF's misconduct and deceit arose when BASF's original product, Poast, faced competition in the national soybean (major crop) market. In the minor crop market, Poast had a dominant position. To meet competition in major crops, while retaining a premium price in minor crops, BASF deceptively devised Poast Plus and marketed expensive Poast to minor crop growers and cheaper Poast Plus to major crop growers. It was a market-segmentation scheme.

The EPA and BASF regarded Poast and Poast Plus as the same herbicide and both products were EPA-registered for the same crops based on the same residue safety data submitted to the EPA under oath by BASF. Both products were applied at the same amount of active ingredient per acre. BASF admitted in federal court and at trial that Poast was $4/acre ($32 per gallon of product) more expensive during the class period. *See, e.g., Peterson*, 12 F. Supp. 2d at 967.

B. *Peterson I* Remanded For Trial

Peterson I rejected BASF's federal preemption defense by distinguishing between regulatory compliance and consumer fraud, *Peterson I*, PA85a-86a (emphasis added):

> *BASF's registering of one herbicide for use on different crops was specifically permitted by the EPA.* 40 C.F.R. § 152.130(b) (1994). [Farmers] presented evidence, however, to suggest that BASF designed a plan *to conceal the fact that Poast Plus was EPA registered for use on minor crops* and to discourage any off-label use of Poast Plus . . . Thus, [farmers] have shown that a genuine issue of material fact exists as to whether BASF's system of deceit falls within the broad protection of the [NJCFA].

C. Dec. 6, 2001 "Marketing And Pricing" Fraud Jury Verdict

On December 6, 2001, 12 jurors unanimously found:

We, the jury in this case, find as a Special Verdict the following facts by way of answers to the following questions submitted to us by the Court:

1. Did Defendant BASF Corporation, engage in an unconscionable commercial practice, deception, fraud, false pretense, false promise, or misrepresentation in relation to BASF's ***marketing and pricing strategies*** for Poast and Poast Plus herbicides?

   Answer: YES X NO ___

2. Did BASF engage in a knowing omission, suppression or concealment of the truth in relation to BASF's ***marketing and pricing strategies*** for Poast and Poast Plus herbicides?

   Answer: YES X NO ___

If you answered "Yes" to any one of Questions 1 and/or 2 above, then answer Question No. 3.

3. Did BASF's conduct or actions as you have found above cause an ascertainable loss to Plaintiffs?

   Answer: YES X NO ___

If you answered Question No. 3 above "Yes", then go to Question No. 4.

4. What, if any, was the monetary value of Plaintiffs' loss caused by BASF's conduct or actions as you found above for the years 1992 to 1996?

1992	$ 2,000,000
1993	$ 5,000,000
1994	$ 3,000,000
1995	$ 4,000,000
1996	$ 1,000,000

RFA1-3 (emphasis added). On April 2, 2002, the trial court entered a "final ... common fund" money judgment for Farmers.

D. *Peterson II* And *III* Affirm Jury Verdict Judgment

The Minnesota Court of Appeals and Supreme Court, viewing the full record, affirmed the jury verdict judgment. *Peterson II*, PA25a-53a; *Peterson III*, PA1a-24a.

E. *Bates* Embraces *Peterson*

Bates affirms that state claims addressing marketing responsibilities of pesticide sellers to consumers are not preempted by FIFRA. 544 U.S. at 444-45. *Bates* acknowledges that "off-label" claims are off the radar of preemption. *Id.* at 444 n.17. *Bates* embraces *Peterson* confirming BASF's fraudulent "marketing and pricing" scheme.

F. *Peterson VI* Decisively Reaffirms Jury Verdict Judgment

The Minnesota Supreme Court unanimously and decisively reaffirmed the jury verdict judgment: "[Farmers'] claims under the [NJCFA] are not preempted by [FIFRA], because they concern ***non-label deceptive statements and conduct*** and do not constitute a requirement for labeling or packaging." *Peterson VI*, PA1a (emphasis added).

STATEMENT OF FACTS

A. Poast And Poast Plus Are The Same Herbicide

Poast and Poast Plus are a post-emergence grass herbicide with the same active ingredient (sethoxydim), EPA-approved for the same crops, based on the same residue test data, to control the same grasses, with the same applications and pounds of active ingredient per acre. Tr.2424:19-2425:10;2776:12-2777:13. BASF's EPA registration submission certified that Poast Plus was "tolerant" for the same minor crops as Poast. PX244 (field/forage/vegetables/fruits). BASF's Regulatory Affairs Director and its regulatory trial expert both testified that BASF would never EPA-register Poast Plus for minor crops without crop safety clearance studies. Tr.1340:14-18;1343:1-8;2673:6-12. Under trade names ***Vantage*** and ***Torpedo***, Poast Plus was legally used on

hundreds of varieties of minor crops across the country, i.e., delicate roses and violets and fruit-bearing trees, without crop injury. Tr.2012:14-2013:18;3110:9-3117:1.

B. BASF's Scheme: "Opportunistically Exploit" Minor Crop Farmers

BASF's exploitation of minor crop farmers originated at BASF's New Jersey headquarters in 1988. Tr.:19-25;13:1-25. BASF decided to price Poast at a premium for minor crop farmers and introduce the same herbicide, cheaper Poast Plus, to meet competition in major crops. BASF was concerned that its scheme would be uncovered, PX217 (emphasis added):

> Does it make sense to position Poast on a high price level in high value [minor] crops and introduce a 2nd grasskiller for soybeans, cotton, sugarbeets for example on a lower price level? ***Will the farmer be controlled in future***?

In 1989, at the direction of parent BASF AG, with instructions emanating from New Jersey headquarters, BASF implemented its exploitive United States' "marketing scheme." PX237. BASF's "Confidential" marketing plan for Poast included these predatory elements: "ACTIVE MARKET SEGMENTATION. OPPORTUNISTIC EXPLOITATION OF NON-SOYBEAN MARKET POTENTIAL." PX234 (emphasis in original).

By 1992, BASF had registered Poast Plus with the EPA as safe for use on the same minor crops as Poast. PX244;Tr.2149:8-2150:1;2424:19-2425:10. BASF attested to the EPA that no new residue studies were needed:[6]

> No new residue data is included and is not needed because the proposed label directions for use in the above listed crops for Poast Plus are ***identical*** to those for the registered product Poast Herbicide (EPA Reg. No. 7969-58) in terms of number of applications, pounds of active ingredient per acre, and PHI [preharvest interval].

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[6] A company must demonstrate the relative safety of a herbicide as it relates to people and the environment. 40 C.F.R. § 158.20 (1993).

PX244 (emphasis added); Tr.2684:22-2685:22. ***Poast and Poast Plus are indistinguishable when used by farmers*** except that Poast was $4.00/acre ($32.00/gallon) more expensive than Poast Plus. PX285;Tr.1291:11-1294:13; 2174:7-25;2236:1-2238:20.

C. BASF's Exploitation Scheme: Concealment Of Material Facts And Overt False Statements

The EPA *and* BASF regarded Poast and Poast Plus as the same herbicide, PX336:

> Any crops currently registered for use on the POAST label can be placed into the POAST PLUS label. All that is needed is a proposed POAST PLUS label, containing that particular use, to submit to the EPA for approval.

BASF concealed from farmers and agriculture officials – and lied when directly confronted – the truth that Poast and Poast Plus were EPA-registered for the same crops. Tr.1876:1-1879:5. BASF's "secret"[7] registration for Poast Plus was a marketing decision. PX336. The deceit is acknowledged in an October 23, 1992 memo from BASF's public relations firm to BASF's marketing division: "***[W]e run the risk of some people knowing*** POAST PLUS is also registered, but not labeled, for [minor crops]." PX41 (emphasis added).

To conceal the EPA registration of Poast Plus and advance its "Opportunistic Exploitation" scheme, BASF's marketing was blatant lies and half-truths. BASF claimed through advertising materials that Poast was the "only" product with registered residue tolerances for minor crops.

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[7] North Dakota Agriculture Commissioner Sarah Vogel detailed, to the EPA, North Dakota's discovery that BASF had lied about the Poast Plus registration, PX365 (emphasis added):

> On May 18, 1994, I received a letter from Mr. Sanders [of the EPA] stating, '. . . the crops, which appear on the Poast label, were accepted [registered] for use on the Poast Plus label in 1992. Your problem appears to stem from ***a company marketing decision in which the EPA had no input.***' . . . This was the first time that the Department of Agriculture learned about BASF's ***secret*** label.

Tr.447:20-449:1. BASF's product line catalog deceptively stated: "Poast Plus for postemergence grass control in multiple crops. ***Registered*** for use on cotton, soybeans, peanuts, alfalfa." PX270 (emphasis added); Tr.445:6-20. BASF executives testified the term "registered" was misleading. Tr.2223:6-12;445:8-20;461:7-21. BASF's concealment and lies regarding the EPA's registration of Poast Plus for minor crops was perpetuated through publications, radio spots, ad slicks, bill stuffers, and postcards directed at minor crop farmers:

> ***Sugarbeets***
> Poast "[c]ontrols more grasses than any other sugar beet herbicide." PX263;264.
> ***Dry Beans***
> "Poast is the only over-the-top grass herbicide developed for dry beans." PX263;264.
> ***Vegetables***
> "For grass control in vegetables, Poast herbicide stands alone. No other herbicide, pre or postemergence, controls so many grasses in all these varieties." PX263;264.
> ***Potatoes***
> Poast "[c]ontrols more grasses than any other potato herbicide." PX263;264.
> ***Flax and Sunflowers***
> *"Poast from BASF is the **only** postemergence herbicide **registered** for use in flax and sunflowers."* RFA826 (emphasis added). "Poast from BASF is *the **only** postemergence herbicide **registered** for use in flax."* PX263;264 (emphasis added).

These promotional pieces misrepresented and concealed that Poast Plus was registered with the EPA for the same crops to control the same grasses, based on the same residue safety data submitted for Poast. Tr.2772:17-25. *"As far as what the plant sees, they'd see the same amount of active ingredient."* Tr.2777:1;1567:19-1569:9.

Class representatives testified they were misled by Poast and Poast Plus advertisements (Tr.1183:25-1187:7;1287:9-1288:16;1445:25-1446:3;1670:11-22) and representations by BASF field representatives at growers'

meetings (Tr.1395:25-1396:17;1443:10-1445:15;1644:18-1645:5;1669:13-1670:10). Farmers did not understand they had been deceived by BASF until North Dakota and South Dakota uncovered BASF's marketing fraud and allowed farmers to use Poast Plus on minor crops. Tr.1292:7-1294:23;1448:24-1449:7;1643:15-1644:20.

D. BASF's Enforcement Scheme: Criminal Prosecution Of Farmers As A "Marketing" Strategy – While Deceiving Farmers, Distributors, Processors And Regulatory Authorities

To exploit minor crop farmers, BASF recognized that it must actively enforce the use of Poast Plus only on major crops. PX247;250. BASF knew that if farmers realized that cheaper Poast Plus was the same herbicide as Poast and EPA registered for the same crops, farmers would question the use of expensive Poast. PX251;2172:18-24. If BASF could not prevent the use of cheaper Poast Plus on minor crops, it would experience millions of dollars in lost profits on the same sales volume. RFA691. BASF recognized that the greatest risk for losing control – "***will the farmer be controlled?***" – were areas, like the Red River Valley of Minnesota/North Dakota, where the same farmers grow major and minor crops side-by-side and purchased Poast and Poast Plus. PX247;251.

BASF urged that farmers be criminally prosecuted for "off-label" use of cheaper Poast Plus on minor crops (PX258;Tr.1863:12-21) – not pursuant to the EPA's underlying taxpayer mandate to regulate the safety of herbicides for man and the environment – but criminal prosecution for "off-label" use only pursuant to BASF's "market[ing] . . . strategy" to "enforce" the use of expensive Poast herbicide on minor crops.[8] PX82;300;Tr.2011:16-2012:6;2012:14-2013:21;2022:1-2024:24;2026:3-2033:12.

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[8] FIFRA provides the EPA and state agriculture departments with enforcement mechanisms for violations of product labels ("off-label" use), including civil administrative penalties and criminal sanctions and fines. 7 U.S.C. § 136j-m.

As BASF's registration specialist acknowledged in a May 11, 1995 internal memorandum: "We already have a registration for POAST PLUS in sunflowers, but we [marketing] have chosen not to include the use in our current label." PX336. Enforcement of BASF's marketing ploy to restrict the Poast Plus label became the means for BASF's enforcement of its "Opportunistic Exploitation" of minor crop farmers. PX333;300.

BASF sent mailings to 5000 food processors and over 3000 dealers under the guise of maintaining the "safety of the food supply" and stewardship. In the mailing, BASF listed the four major crops on the Poast Plus label as its EPA registration (approved "residue tolerances"), while omitting that Poast Plus was also EPA-registered with the same "residue tolerances" for the same minor crops as Poast. PX35;249. The deceptive purpose of these mailings was to enlist food processors and dealers to restrict the use of Poast Plus to only the major crops in order to "***protect the food supply***" and "***avoid residue problems.***" *Id.* Yet, BASF had already certified to the EPA that there were no residue or crop safety (tolerance) problems in using Poast Plus on minor crops. Tr.2684:22-2685:22. BASF fraudulently and unconscionably used food processors and dealers to enforce its "Opportunistic Exploitation" of minor crop farmers and conceal the EPA registration of Poast Plus. PX249.

To further reinforce the risk of off-label use of Poast Plus, BASF used its public relations firm to draft a Position Paper that was mailed to a wide variety of agencies and processors involved with minor crops that could influence farmers regarding off-label use of Poast Plus. PX253;Tr.1857:13-1858:13. The Position Paper stressed "hefty fines" for off-label use and the dangers to consumers and the environment (PX252A;253B), even though BASF knew that Poast Plus was EPA approved as safe for use on the same crops as Poast. PX244. The Position Paper falsely stated that Poast was, "[T]he ***only*** postemergence ***product registered*** to control grasses in [minor crops] . . . " PX252A (emphasis added); Tr.3588:15-24.

E. BASF's Deceit Unravels: Farmers And State Officials React When Truth Of EPA Registration Status Of Poast Plus Becomes Known

BASF's own sales force predicted that BASF's fraudulent "Opportunistic Exploitation" scheme would fail, PX402 (emphasis added) (Tr.2231-33):

> One more group can be added to the growing list of people who are not happy with the ***sethoxydim market segmentation scheme*** from BASF. A research agronomist from ***Pillsbury Green Giant*** called to discuss quote "the similarity between the two sethoxydim formulations." To him, it was very clear that their company and the food processors in general were being singled out and asked to pay a much higher price for post emergence grass control.

The grim concern of BASF and parent BASF AG at the dawn of the scheme – "***Will the farmer be controlled***" – proved prescient. RFA450 (emphasis added). Minor crop farmers began disregarding BASF's container (marketing) label restricting Poast Plus to major crops. RFA1466;780;793;969 (BASF memo describing scheme as "becoming transparent").

BASF egregiously enacted a strategy to use state agriculture departments to perpetuate its "Opportunistic Exploitation" scheme by using their agriculture inspectors to "monitor and enforce the use of Poast over Poast Plus". PX217. BASF turned in its own dealers to Agriculture Inspectors for selling Poast Plus to farmers growing minor crops. PX251;276;384. This resulted in "hefty fines" to dealers and farmers despite the fact that EPA approved Poast Plus safe on minor crops. RFA849;Tr.1727:2-17. As prosecutions increased, BASF took the extreme step of lying to state Agriculture Departments regarding EPA registration of Poast Plus. *See, e.g.*, Tr.1730:13-1731:12. For example, BASF executives lied to the North Dakota Pesticide Control Board ("Control Board") to conceal the EPA registration of Poast Plus for the same crops as Poast. Tr.1876:1-24;1877:20-24;1929:2-18. A BASF memorandum noted the need to "develop a strategy" ***if North Dakota officials had already learned the truth*** (PX71) (emphasis added):

> North Dakota State has indicated that they have requested information from EPA *and may know* by the time of the March 28 meeting that *Poast Plus is also labeled in all these crops and that BASF has chosen not to extend this label to the marketplace*. . . . This will involve some ***nebulous argumentation*** . . . that EPA could request side-by-side residue work for Poast Plus and Poast.

Minutes of the March 1994 Control Board demonstrate BASF's overt lies:

> *BASF was asked if they could expand the Poast Plus label* [to all minor crops on the Poast label]. *They said they could not* because of economics. When questioned on whether the EPA may allow them to expand the Poast Plus label based on the current residue package submitted on sethoxydim, *BASF did not know*. However, they feared if they put this issue to question with the EPA, *the* ***EPA may require BASF to do residue testing for the Poast Plus as well.***

PX73 (emphasis added);Tr.1888:25-1889:12. The Control Board wrote the EPA to determine if Poast Plus *could be registered* for use on minor crops. The EPA responded:

> A review of our records indicate that the crops, which appear on the Poast label, were accepted (registered) for use on the Poast Plus label in 1992. Your problem appears to stem from ***a company marketing decision in which EPA has no input.***

RFA385 (emphasis added); Tr.1888:25-1890:7. A confidential internal BASF memorandum to management states that the EPA was upset that BASF had deceived the Control Board:

> Mr. Taylor (EPA) told me he did not appreciate getting put in the middle of this issue since ***it is related to a marketing strategy and is not a regulatory matter***. Furthermore, EPA has already granted registration of POAST PLUS in most of the crops for which POAST is labeled, without requiring additional residue data from BASF. Mr. Taylor knows that the statement made to Ms. Vogel and attributed to BASF is ***incorrect***, and ***he is not pleased that BASF misdirected her*** as to where the issue really lies.

PX82 (emphasis added). At trial, a BASF executive, ***admitted that the statements he and another BASF executive made to the Control Board were false***, but that he ***was told*** to make them by senior executive William Wisdom. Tr.458:1-23.

As BASF turned in dealers and farmers for off-label use of Poast Plus, minor crop farmers petitioned regulators for the right to use cheaper Poast Plus. PX396;397. After BASF's lies were uncovered by North and South Dakota authorities, RFA857-58, North and South Dakota issued 7 U.S.C. § 136v(c)(1) (Rule 24(c)) registrations to use cheaper Poast Plus on minor crops.[9] PX298;129. Although BASF opposed the Rule 24(c) labels, BASF's own trade and lobbying organization (American Crop Protection Association) refused to support BASF's opposition. PX291. North Dakota Agriculture Commissioner Vogel bluntly responded to BASF's opposition: *"[BASF] has eroded public respect for the registration process."* PX291 (emphasis added).

The EPA rejected BASF's opposition. PX132;Tr.2669:17-2670:20;Tr.2689:5-9. Minnesota and Montana officials also considered a Rule 24(c) label for Poast Plus after learning that North and South Dakota had done so. PX133;300;313 ("[BASF] believe[s] the state of Minnesota may also have granted a 24(c) registration for Poast Plus for the same uses."). The matter became moot for ***Minnesota and all other states*** because, after the actions of North and South Dakota and commencement of the *Tompkins* class action in North Dakota, ***BASF reduced the price of Poast to equal Poast Plus nationwide in 1997***. Clerk Doc. 563.

F. BASF's "System Of Deceit"

The unanimous *Peterson II* court concluded, PA28a-29a:

> The farmers showed that BASF engaged in an advertising campaign claiming that only Poast was registered with

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[9] BASF's reaction to the North and South Dakota 24(c) registrations was predatory. BASF, through a personal telephone call from Executive William Wisdom, ***maliciously threatened to personally sue North Dakota Agriculture Commissioner Sarah Vogel***. Tr.1759:14-25-1760:1-11.

the EPA for minor crops, despite the fact that Poast Plus was EPA-registered for the same minor crops. Other evidence showed that BASF used mailings to food processors and dealers, an article submitted to *The Sugarbeet Grower* magazine, and a position paper emphasizing the dangers of "off-label" use, despite the fact that Poast Plus had been approved for minor corps. In another strategy, BASF turned in its own dealers to the North Dakota agriculture inspectors for selling Poast Plus to minor-crop farmers in violation of state pesticide laws, leading to criminal prosecutions of dealers and farmers. Further, the farmers introduced evidence to show that BASF personnel lied to the North Dakota Pesticide Control Board to conceal the fact that Poast Plus was EPA-registered for the same crops as Poast. Once the board learned from EPA officials that this was merely a marketing strategy, North Dakota, as well as South Dakota, obtained so-called "rule 24(c)" special local needs registrations with the EPA, allowing their farmers to use Poast Plus on minor crops.

Farmers' FIFRA expert, Dr. Charles Benbrook, testified: "It was, for approximately a five-, six-year period, price gouging." Tr.1939:17. Agriculture Commissioner Vogel and Jack Peterson, head of pesticide enforcement for North Dakota, bluntly and repeatedly testified that BASF had lied to them: "***[I] can take hard answers, but don't lie. Just – you don't lie.***" Tr.1878:5-6; 1559;1746:2-23;1748:22-1749:9;1753:14-15;1756:1-7;1758:13-20; 1765:17-1766:5;1788:6-11;1830:19-25;1878:7-1879:14. BASF's management conceded that BASF's marketing for Poast Plus was misleading, Tr.461:11-20:

A. (Chris Coombs) (reading from BASF marketing materials) Okay. Poast Plus is registered for use on the following crops only. Cotton, soybeans, peanuts and alfalfa.

Q. ***Stop there. Do you consider it to be a material omission to say that Poast Plus is registered for use on the following crops only, cotton, soybeans, peanuts and alfalfa, when you knew that it was registered on all of the same crops as Poast?***

A. ***Yes, I would consider that.***

ARGUMENT

I. MINNESOTA SUPREME COURT, APPLYING *BATES* TO BASF'S FRAUDULENT MARKETING SCHEMES, DECISIVELY REAFFIRMS JURY VERDICT JUDGMENT

Bates holds that state claims addressing marketing responsibilities of pesticide sellers to consumers are not preempted by FIFRA, 544 U.S. at 443-49:

- FIFRA is not intended to deprive injured parties of compensation under state claims addressing pesticide sellers' marketing responsibilities to consumers;
- Jury verdicts do not establish "labeling and packaging" requirements; and
- Off-label claims are beyond FIFRA.

A. Presumption Against Preemption

This Court in *Bates* emphasized: "[W]e have long presumed that Congress does not cavalierly pre-empt state-law causes of action. In areas of ***traditional state regulation***, we assume that a federal statute has not supplanted state law unless Congress has made such an intention 'clear and manifest.'" 544 U.S. at 449 (emphasis added; citations omitted).

B. Jury Verdicts For Fraudulent Marketing Schemes Do Not Establish "Labeling And Packaging" Requirements

This Court in *Bates*, rejecting the chemical industry complaint that product marketing claims are preempted by FIFRA, a health and safety law, expressed a two-part preemption test, 544 U.S. at 444 (emphasis in original):

> For a particular state rule to be pre-empted, it must satisfy two conditions. First, it must be a requirement "*for labeling or packaging*"; rules governing the design of the product, for example, are not pre-empted. Second, it must impose a labeling or packaging requirement that is "*in*

addition to or different from those required under [FIFRA]."

1. First *Bates* Test Is Dispositive: BASF Complaint That Jury Verdict Requires "Labeling And Packaging" Change Violates Commonsense And Misrepresents And Denies Historical Record

a. Violates Commonsense

Farmers' jury verdict judgment, grounded in BASF's off-label "marketing" misconduct, is far beyond the *Bates* preemption test. The jury verdict against BASF, under the NJCFA, absolutely does not impose a "requirement for 'labeling and packaging.'" The Minnesota Supreme Court was clear, *Peterson VI*, PA13a-14a:

> We concluded [in *Peterson III*], and we do so again, that the farmers' claims that BASF engaged in fraud, deception, and unconscionable conduct in violation of the [NJCFA] are based on BASF's marketing and advertising actions and not on the content of the product labels.

The jury verdict does not impede the EPA's mandate under FIFRA to evaluate the safety of products for people and the environment. The unanimous jury found that BASF violated honesty in the marketing of its herbicide.

Nothing about the jury verdict requires BASF to do anything other than honestly market its product. *Peterson VI*, PA17A ("***The duty*** the farmers' claims imposed on BASF was . . . to ***refrain from deceptive statements*** about their EPA registration, their active ingredient composition, and their relative efficacy on major and minor crops.") (emphasis added). FIFRA does not preempt consumer fraud claims; it coexists with state remedies to prevent market fraud.

b. Misrepresents And Denies Historical Record

BASF's argument that the Minnesota fraudulent "marketing and pricing" jury verdict is a requirement for "labeling and packaging" misrepresents the historical

record by glaring omission. After North Dakota and South Dakota uncovered BASF's fraud and commencement of the North Dakota class action, BASF ***did not change the label*** but merely equalized the price of Poast and Poast Plus. *See Tompkins, et al. v. BASF Corp.*, Civil No. 96-59, Traill County, ND (1996) ("*Stipulation of Settlement*" for *Tompkins*) (executed March 14, 1997), at p. 8 (emphasis added): "***After filing of [farmers'] lawsuit***, in contemplation of the 1997 growing season, [BASF] determined unilaterally to effect a nationwide price reduction of [Poast], thereby causing the ***price of Poast to be equivalent to the price of Poast Plus*** on a per acre basis."

c. "[I] Can Take Hard Answers, But Don't Lie . . . Just – You Don't Lie"

BASF fails the "labeling and packaging" test for another reason. BASF's off-label marketing misconduct; lies, deceit and smoking-gun evidence, is off the radar of preemption:

- BASF internal marketing memo (PX234) discussing the "***risk***" of farmers across the United States discovering the truth.
- BASF internal marketing memo (PX217) expressing grim concern that its deceitful scheme would be uncovered by farmers: "***Will the [North American] farmer be controlled in future?***"
- "***Opportunistic exploitation***" of minor crop farmers by threatening and encouraging the criminal prosecutions of farmers for "off-label" use of cheaper Poast Plus as a marketing "strategy." PX232;258;82;300.
- BASF internal memorandum (PX334): EPA was "***not pleased***" that BASF "***misdirected***" state regulatory officials.
- BASF executive Chris Coombs at trial admitted "***false . . . statements***" to North Dakota Pesticide Control Board but said he was told to make the statements by BASF management. Tr. 458:12-24; 459:1-4; 461:9-19).

- North Dakota regulatory officials testifying at trial about BASF's lies and deceit: "***[I] can take hard answers, but don't lie . . . Just – you don't lie.***" (Tr. 1878:5-6).

Bates, 544 U.S. at 444 n.17 (off-label marketing misconduct is outside preemption).

2. Second *Bates* Test Is Never Reached: *Peterson* Is Not A "Misbranding" Case Challenging Accuracy Of Statements On The Label

Peterson is an off-label "fraudulent marketing" case. It is not a "misbranding" case, like *Bates*, with a label stating the herbicide is "safe" for peanuts, when there is evidence the defendant company knew the herbicide might kill the peanut crop in certain soil conditions. *Peterson* does not challenge the veracity of statements on the product container label. Pints are pints; ounces are ounces. *Peterson VI*, PA16a, quoting *Peterson II* (emphasis in original):

> [T]he farmers here were not asserting that BASF's registration and container labels were false or misleading, * * * [r]ather, the farmers' point was that *even if* BASF's labels were technically accurate, BASF could and did commit consumer fraud by leading farmers to believe that the cheaper Poast Plus could only be used on major crops * * *.

C. Regulatory Compliance Has No Relation To Consumer Fraud

1. EPA Allows "Split And Subset Labeling" But Does Not Address Marketing Strategies

BASF's claim that EPA approval of the Poast and Poast Plus container labels also grants BASF license to perpetrate a fraudulent "marketing and pricing" scheme is plainly false. As recognized in *Peterson VI*, PA17a, *Peterson II*, PA35a-36a and *Peterson I*, PA85a, the EPA permits a company to register an approved set of uses for a single active pesticide ingredient but container label the product sold to consumers for only some and not all of the registered uses. 40 C.F.R.

§§ 152.113 and 152.130(b) ("split and subset labeling"). The EPA also allows companies to register alternate brand names for a registered product. FIFRA § 3(e).

The EPA does not ascertain why companies spiit or subset label their pesticides, beyond a demonstration that a split or subset label "*would not significantly increase the risk of any unreasonable adverse effect on the environment.*" 40 C.F.R. § 152.113(b) (emphasis added). BASF's registration specialist acknowledged in a May 11, 1995 internal memorandum: "We already have a registration for POAST PLUS in sunflowers, but we [marketing] have chosen not to include the use in our current label." PX336. Simply stated, the EPA does not address company marketing and pricing schemes. *Peterson VI*, PA17a ("farmers' claims do not challenge the legality of BASF's subset [container] labeling, but rather its misrepresentations about the products. . . .").

2. BASF's Regulatory And Marketing Experts Conceded At Trial That Regulatory Compliance Has No Relation To Consumer Fraud

Farmers' claims were based on BASF's broad scheme of fraudulent "marketing and advertising" and not a claim of "misbranded" product labels. *Peterson IV*, PA15a-16a (quoting *Peterson III*). During trial, BASF's regulatory and marketing experts and management conceded the EPA and state herbicide regulatory process has no relation to whether a company deceptively and fraudulently markets and sells a product: Daniel Barolo (***BASF FIFRA expert***) (EPA and state regulatory process has no relation to consumer fraud), Tr.2697:7-11; Dr. Dale Dahl (***BASF marketing expert***) (irregardless of EPA and patent registrations, company can still commit consumer fraud in the sale of its product), Tr.3352:5-17; William Wisdom (***BASF management***) (EPA does not concern itself with company marketing practices), Tr.1017:7-15.

D. BASF's Injudicious Second Petition Is A Game Of "Do-Over"

1. Factual Argument BASF Lost Before The Jury

a. Same Product

BASF's complaint that Poast and Poast Plus are not identical, is a misrepresentation of Farmers' fraudulent "marketing and pricing" claim under the NJCFA. Poast and Poast Plus are essentially the same product; that is, Poast and Poast Plus have the same active ingredient (sethoxydim), are EPA approved for the same crops, based on the same residue test data, to control the same grasses, with the same applications and pounds of active ingredient per acre. Tr.2424:19-2425:10;2776:12-2777:13. ***Poast and Poast Plus are indistinguishable when used by farmers*** except that Poast was $4.00/acre ($32.00/gallon) more expensive than Poast Plus. Tr.1291:11-1294:13;2174:7-25;2236:1-2238:20.

The unanimous Minnesota jurors and appellate judges readily understood that BASF deceptively marketed Poast and Poast Plus as different products, at different prices, as a "system of deceit" to extract inflated prices from minor crop farmers. The Minnesota Supreme Court on remand re-emphasized:

> "[W]e again reject BASF's characterization of the farmers' claims as requiring that the two products be labeled as one. While the farmers might have believed that would have been a more honest approach for BASF to take, that was not the factual or legal basis for their claims. The duty the farmers' claims imposed on BASF was not to register and label Poast and Poast Plus as one product, but rather, having registered and labeled them separately, to refrain from deceptive statements about their EPA registration, their active ingredient composition, and their relative efficacy on major and minor crops.").

Peterson VI, PA17a; *Peterson III*, PA71a (***"[E]vidence was presented*** that Poast and Poast Plus are essentially the same product . . . this evidence was presented to illustrate . . . a scheme to exploit the farmers through consumer

fraud.") (emphasis added); *Peterson II*, PA33a ("jury clearly had evidence from which it could conclude that Poast and Poast Plus were the same product, and ***we will not substitute our judgment for that of the jury.***") (emphasis added); *see, e.g.*, PX117 (BASF July 3, 1995 internal memorandum discussing "***market strategies***" of "***differential pricing of the same active ingredient***") (emphasis added).

b. State Registration And Crop Safety

BASF argues it was not required to register Poast Plus, and did not register Poast Plus, for minor crops in any state. BASF also complains the potential for crop injury prevented BASF from registering Poast Plus for minor crops.

BASF disingenuously ignores jury evidence that in a variation of its market-segmentation scheme, BASF re-named Poast Plus as ***Vantage*** and ***Torpedo***, PX95;240;323;325, and procured state registrations for their use on minor crops throughout the United States at ***twice the price of identical Poast Plus***. PX135;Tr.2012:14-2013:18;3110:9-3117:1. Under alternate trade names, Poast Plus was legally used on hundreds of varieties of minor crops across the country, i.e., fruits, Christmas trees, delicate roses and violets, without crop injury. PX95;135; 240;321; 323;325; Tr.2012:14-2013:18;3110:9-3117:1. The Minnesota Supreme Court, viewing the full trial record, pointedly said on remand:

> With regard to BASF's third argument, that the farmers' claims would require marketing products in all 50 states and on all crops for which they are EPA-registered, regardless of the manufacturer's concerns for safety and the need for additional testing, we note first that this is a policy-oriented argument that is not founded on the preemption criteria under FIFRA. Moreover, we are compelled to observe that ***under the facts of this case the argument bears little credibility.*** BASF assured the EPA that no additional testing was required for its registration of Poast Plus for minor crops because the results would be the same as those it had submitted in support of its registration of Poast.

> Furthermore, ***evidence was submitted*** that established that the choice in this case to limit state registration and availability of Poast Plus for use on minor crops was a ***marketing decision*** intended to maximize profits, not generated by safety concerns.

Peterson VI, PA17a-18a (emphasis added); *see also Peterson II*, PA39a (farmers presented evidence, including expert testimony, from which ***"jury could [conclude]"*** that BASF's state registration decisions were part of BASF's national system of deceit) (emphasis added).[10]

2. "Procedurally Waived" And Misplaced Effort To Reargue Trial Evidentiary And Jury Instruction Rulings

This Court does not address issues "procedurally waived" in state court. *NO JURISDICTION FOR ISSUES WAIVED IN STATE COURT*, p. 2, *supra*. To leave no stone unturned, on remand the Minnesota Supreme Court went beyond its "procedurally waived" ruling to squash BASF's argument, *Peterson VI*, PA24a (emphasis added):

> BASF's proposed instructions ***do not relate directly to the charge before the jury***, which was whether BASF violated the NJCFA. Further, throughout the entire trial, the jury heard numerous discussions of these issues and the various witnesses' descriptions of the effect of the regulations. These topics were more properly the subject of counsel's final argument rather than jury instructions, and the court did not abuse its discretion in denying the request to include these instructions.

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[10] BASF's state registration argument is a disguised effort to reargue causation, an issue resolved in *Peterson III* and *II* and outside *Bates*, federal preemption, and BASF's FIFRA petition issue. *Peterson VI*, PA17a ("a policy-oriented argument that is not founded on the preemption criteria under FIFRA . . . the argument bears little credibility"); *Peterson III*, PA77a-81a; *Peterson II*, PA36a-40a; *see generally* Dunnell Minn. Digest, *Torts*, § 1.03 (4th ed. 2000) (***causation is a quintessential jury issue***).

II. MINNESOTA SUPREME COURT REJECTED BASF'S MOOT AND PROCEDURALLY WAIVED FIRST AMENDMENT COMPLAINT ON REMAND

BASF's First Amendment issue (trial "evidentiary ruling"), beyond moot and "procedurally waived" in state court, is ridiculous. Fraudulent marketing representations are never protected speech. *See Illinois ex rel. Madigan, Attorney General v. Telemarketing Assoc., Inc.*, 538 U.S. 600, 617 (2003); *Greater New Orleans Broadcasting Assn. v. U.S.*, 527 U.S. 173, 183 (1999); *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 562-64 (1980); *Friedman v. Rogers*, 440 U.S. 1, 9-10 (1979). Unlike *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003), a political activist challenging advertisements by Nike defending its treatment of Southeast Asian workers, *Peterson* does not involve ideological use of a consumer fraud statute *without personal injury* to engage a *public policy* debate. The *Peterson* plaintiffs are not ideological; they suffered direct harm. They are at the opposite end of the spectrum: farmers defrauded of millions of dollars by BASF's deceit.

CONCLUSION

BASF's "system of deceit" was addressed by the Fargo (ND) *Forum* after BASF's marketing deceit was uncovered by the North Dakota Department of Agriculture, Clerk Doc. 562:

> Shame on chemical company. . . . Its not just the money. BASF has been caught with their pants down. They have seriously undermined farmer confidence in the honesty of chemical companies and the integrity of safety rules. Shame on them.

For all the foregoing reasons, the Court should deny BASF's petition.

Respectfully submitted,

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October 11, 2006

APPENDIX TABLE OF CONTENTS

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December 6, 2001 Special Verdict Form..... RFA1

RFA1

STATE OF MINNESOTA
COUNTY OF NORMAN

IN DISTRICT COURT
NINTH JUDICIAL COURT
CIVIL DIVISION

Ronald Peterson, Barry Thune, Owen Larson, Owen Larson Farms, Inc., Duane Evenson, Jeffrey Nesvig, Richard Moen, Christopher Grove, Christopher Grove Farms, Inc., David Abentroth, Glenn Asbeck, Asbeck Inc. Donald Steinbeisser, Joe G. Steinbeisser and Sonds, Inc., Stephen Pust, and Stephen Pust Farms, Inc., individually and on behalf of all others similarly situated,

Plaintiffs,

v.

BASF Corporation, a foreign corporation,

Defendants.

PHOTOCOPY

SPECIAL VERDICT FORM

Court File No. C9-98-656

We the Jury, duly impaneled and sworn in the above-captioned matter, give the following answers to the following special verdict questions:

1. Did Defendant BASF Corporation, engage in an unconscionable commercial practice, deception, fraud, false pretense, false promise, or misrepresentation in relation to BASF's marketing and pricing strategies for Poast and Poast Plus herbicides?

Answer: X (YES) _____ (NO)

2. Did BASF engage in a knowing omission, suppression or concealment of the truth in relation to BASF's marketing and pricing strategies for Poast and Poast Plus?

Answer: X (YES) _____ (NO)

If you answered "Yes" to either Questions 1 and/or 2 above, then answer Question 3.

3. Did BASF's conduct or actions as you have found above cause an ascertainable loss to Plaintiffs?

Answer: X (YES) _____ (NO)

If you answered Question 3 above "Yes" then go to Question 4.

4. What, if any, was the monetary value of Plaintiffs' loss caused by BASF's conduct or actions as you found above for the years 1992 to 1996?

1992 $2,000,000

1993 $5,000,000

199[4] $3,000,000

1995 $4,000,000

1996 $1,000,000

Dated this 6th day of December, 2001, at 1:47 pm o'clock _.m. in the County of Norman, Ada, Minnesota.

/s/ Clarisse Austinson
FOREPERSON

After six hours of deliberation, ten of the jurors may agree upon and return the special verdict form.

If only ten of twelve jurors concur, all concurring jurors must sign:

1. _____	6. _____
2. _____	7. _____
3. _____	8. _____
4. _____	9. _____
5. _____	10. _____

This special verdict form was signed at ___ o'clock __.m.

Dated: _____, 2001.

_____

FILED
OCT 25 2006
OFFICE OF THE CLERK

(6)

No. 06-144

In the Supreme Court of the United States

BASF CORPORATION,

Petitioner,

v.

RONALD PETERSON, ET AL.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Minnesota

PETITIONER'S REPLY BRIEF

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Respondents' brief in opposition offers a dizzying rehash of their summation to the jury. We lack the space to correct respondents' many factual misstatements, although we address below some of their most misleading assertions. The crucial point, however, is that respondents' overheated rhetoric cannot obscure the important and recurring *legal* questions presented here. Respondents' brief leaves it essentially undisputed that the Minnesota Supreme Court imposed state-law liability for actions that are required or expressly authorized by FIFRA and its implementing regulations. That court also allowed respondents to construct a case out of direct, repeated attacks on the accuracy of BASF's pesticide labels – while holding that the jury need *not* be instructed on FIFRA's labeling rules. And the decision below premised liability on concededly truthful speech that actually *facilitated the enforcement of federal law*. Leaving those holdings intact will frustrate important federal regulatory policies, foment litigation by permitting plaintiffs to circumvent FIFRA preemption through the use of semantic gamesmanship, and chill protected speech. Further review therefore is in order.

A. FIFRA Preempts The State Law Labeling Requirements Applied Below

Respondents' principal argument is that their claim escapes preemption because they do not challenge the accuracy of BASF's labels. Instead, they say, their lawsuit is directed at assertedly fraudulent marketing and advertising – in particular, at what they characterize as BASF's failure to publicize Poast Plus's EPA registration status. See Br. in Opp. 3, 4, 9, 12, 23, 24, 26. For several reasons, this contention is wrong.

1. First, as we showed in the petition (at 14-19), respondents' theory of liability ultimately reduces to the claim that BASF committed an "unconscionable commercial practice" by declining to label Poast Plus for use on minor crops in all

50 states. That necessarily is so. The alleged harm suffered by the nationwide class of respondents stemmed from their inability to use Poast Plus on minor crops. See Br. in Opp. 13-16. But respondents were not, and could not have been, injured in this regard by anything BASF said (or failed to say) in its marketing or other public statements about the EPA registration status of Poast Plus. Instead, it was *the omission of minor crops from the product's label and the absence of state registration for those crops* that precluded respondents from legally using Poast Plus as they wished. Respondents' "injury" thus followed, not from BASF's statements, but from the failure to list minor crops on the Poast Plus label. Respondents' real theory accordingly must be that BASF was obligated by New Jersey's consumer protection law to label, obtain state registration, and sell Poast Plus for use on all crops for which the product was registered with the EPA.

There can be no doubt that this was the theory of liability propounded by respondents and embraced by the court below. We showed in the petition (at 6-8) that respondents established their claim at trial largely through repeated, inflammatory testimony that the Poast Plus label was "false," "deceptive," and "lied" because it did not list minor crops or report that the EPA had registered the product for use on those crops; respondents do not deny their pervasive use of such evidence. We also showed (at Pet. 15) that respondents sought damages for every gallon of Poast sold nationwide for use on minor crops during the class period, a damages claim that ultimately had to be premised on the theory that BASF was legally obligated to label Poast Plus for use on minor crops in all 50 states; again, respondents make no response. Most notably, respondents *do not deny* that state law, as interpreted by the court below, requires pesticide manufacturers to label their products for use on all crops for which they are registered with the EPA. The Minnesota Supreme Court read the governing state law the same way: the court did not

dispute BASF's showing that respondents' "claims would require marketing products in all 50 states and on all crops for which they are EPA-registered." Pet. App. 17a. But the court rejected BASF's challenge to that state-law rule as "a policy-oriented argument that is not founded on the preemption criteria under FIFRA." *Id.*.

In reaching this conclusion, the court below misunderstood FIFRA and departed from *Bates*. The Minnesota court interpreted state law to impose liability on BASF for failing to label Poast Plus for use "on all crops for which [it is] EPA-registered." Pet. App. 17a. Because that rule hinges liability on the contents of the Poast Plus label, it is expressly preempted by FIFRA, which provides that, once the EPA determines that a pesticide label "compl[ies] with [FIFRA's] requirements" (7 U.S.C. § 136a(c)(5)(B)) – as Poast Plus's label unquestionably did – a state "shall not impose or continue in effect any requirements for labeling * * * in addition to or different from those required under this subchapter." 7 U.S.C. § 136v(b). See *Bates*, 544 U.S. at 452. By the same token, the decision below conflicts with substantive FIFRA labeling requirements by denying manufacturers an option expressly provided by federal law: the right to obtain a broad EPA registration for their pesticides while labeling and seeking state registration for only a subset of those uses. See 40 C.F.R. § 152.130(b); Pet. 16-19.

2. The rule applied below also is preempted for a second, closely related reason. We showed in the petition (at 16-17) that respondents sought to premise liability on the ground that Poast and Poast Plus are identical products and that it was an "unconscionable commercial practice" for BASF to market the pesticides under different names, for different uses, and at different prices. Respondents now *expressly acknowledge* that this was a central element of the theory on which they presented the case and the lower courts imposed liability: "Minnesota jurors and appellate judges readily understood that BASF deceptively marketed Poast and Poast

Plus as different products, at different prices, as a 'system of deceit' to extract inflated prices from minor crop farmers." Br. in Opp. 27. See *id.* at 7 ("BASF defrauded thousands of farmers by deceptively marketing the same herbicide as different products"), 9 ("BASF engaged in a national 'system of deceit' * * * by marketing the same herbicide as different products").[1]

This ground for recovery, however, is flatly inconsistent with federal law. Federal regulations defined Poast and Poast Plus as different products and required BASF to register and label them under different names. Poast and Poast Plus are chemically different, as respondents admitted below (AA-747-748); they have different chemical formulas (Tr.1253:9-12; 1256:2-5; 1435:12-19), ingredients (Tr.2682:3-10), concentrations of solvent (Tr.2731:19-2732:2), tank mix compatibilities (Tr.3006:4-10), crop injury risks (AA-412; 498-500), and human skin irritation properties (AA-470-473; 511). At trial, the director of EPA's Office of Pesticide Programs during the relevant period accordingly testified that, because Poast and Poast Plus had different percentages of active ingredients and different inert ingredients, BASF was *required* to register the two products separately (Tr. 2562:12-2563:5, 2564:9-2565:13, 2566:7-10, 2568:9-2569:20) and name the two products differently (Tr:2569:21-2470:12; 2572:9-14; 2573:6-20).

EPA regulations confirm that testimony. Because of their chemical differences, EPA regulations *required* BASF to register Poast and Poast Plus as *separate* products; to label and market them under *different* names (40 C.F.R. §§ 152.15,

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[1] In rejecting BASF's argument on this point, the court below opined that respondents did not argue "that the two products [should] be labeled as one." Pet. App. 17a. But respondents' brief in this Court itself belies the state court's observation – an observation that, we respectfully suggest, mischaracterizes the course of proceedings below.

152.42-.43, 158.175; U.S. Environmental Protection Agency, Label Review Manual (3rd ed. Aug. 2003) Ch. 12: Labeling Claims); and to submit *separate* toxicology data for each (see 40 C.F.R. § 158.340). Respondents do not dispute these requirements, instead simply ignoring this point. They accordingly offer no reason to doubt that the court below imposed a labeling requirement that clashes with federal law.

3. The issue presented here is a recurring one of substantial importance. *Bates* should have settled that, although FIFRA does not preempt state-law suits relating to pesticide safety and efficacy, the statute and its implementing regulations *do* preclude claims that challenge the adequacy of EPA-approved pesticide labels. But on remand after *Bates*, the court below evaded *Bates*' conclusions regarding FIFRA's labeling rules by endorsing a theory of liability that, in its practical operation, requires manufacturers to label and sell pesticides for all EPA-registered uses in all 50 states.

This holding turns the *Bates* analysis upside down. As this Court emphasized, the EPA does not itself test, or in most instances even review, the efficacy or crop safety of pesticides. See 544 U.S. at 440. Instead, *manufacturers* bear responsibility for such testing: the Court in *Bates* explained that, even after EPA registration, manufacturers have a "continuing obligation" to "use the utmost care in the business of distributing inherently dangerous items." *Id.* at 438, 450. The obligation to ensure pesticide safety also is shouldered by state authorities, who play a "broad role" in approving the use of pesticides for particular purposes. *Id.* at 450. The holding below, however, obligates pesticide manufacturers to label and sell *all* their products for *all* EPA-registered uses in *all* 50 states or face massive damages liability – even when (as in this case) the manufacturer believes that there has been inadequate safety testing or when (also as in this case) the affected states do not approve (or actually have disapproved)

the proposed uses.[2] This holding disrupts the federal/state "regulatory partnership" established by FIFRA (*Wisconsin Pub. Intervenor Mortier*, 501 U.S. 597, 615 (1991) and poses a grave threat to the Nation's system of pesticide regulation.[3]

The Minnesota Supreme Court's holding also places pesticide manufacturers in an intolerable bind. When faced with the prospect of trebled damages liability in national class actions for failure to label their products for all EPA-registered uses, manufacturers no longer will be able to find a safe harbor in compliance with FIFRA's labeling regulations or to rely on EPA's guidance that "the label is the law." See Pet. 18. Instead, they will be forced either to rush their EPA-registered pesticides to market without adequate safety testing, or to delay registration of new pesticides. In either case, the policies of the federal regulatory scheme will be substantially undermined. To the extent the Court has any doubts on that score, it may wish to invite the Solicitor General to express the views of the United States on the question.

B. *Bates* Requires That The Jury Be Instructed On FIFRA's Requirements

As we argue in the petition (at 21-23), the Minnesota Supreme Court compounded its substantive error regarding the scope of FIFRA preemption by holding that BASF was not entitled to jury instructions on the contents of FIFRA's labeling rules. The brief in opposition confirms the merit of this point. Respondents do not dispute that they bombarded the

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[2] The court below expressed skepticism about BASF's "concerns for safety and the need for additional testing." Pet. App. 17a-18a. But the undisputed record shows that BASF scientists insisted – in writing – on additional safety testing before Poast Plus was labeled for use on minor crops. See Pet. 5.

[3] BASF was held liable to California class members even though California affirmatively refused to register Poast Plus for *any* use. Pet. 5 n.1.

jury with evidence and argument attacking the accuracy of BASF's labels, challenging BASF's entitlement to engage in subset labeling, and asserting that Poast and Poast Plus are identical products that should have been identically labeled. See Pet. 6-8 (citing record). All of this argument and evidence exhorted the jury to find BASF liable for engaging in conduct that was explicitly authorized or required by FIFRA. *Bates* addressed precisely this sort of danger by holding that "a court should instruct the jury on the relevant FIFRA misbranding standards, as well as any regulations that add content to those standards." 544 U.S. at 454. The court below departed from *Bates*, and committed a fatal error, in holding such an instruction unnecessary here.

Respondents make no serious attempt to address this issue. They do not deny that their evidence and argument challenged the veracity of BASF's labels or that, as a result, jury confusion was virtually unavoidable. Their only real contention on the merits of this point is that FIFRA instructions were unnecessary because this case supposedly did not involve a state-law claim of deceptive labeling. Br. in Opp. 29. For reasons we explain above and in the petition (at 6, 14-16), that argument ignores the nature of respondents' claim before the jury and the description of that claim in respondents' complaint. But more fundamentally, respondents' approach would render wholly nugatory *Bates*' guidance regarding the importance of FIFRA instructions.

Respondents argue that plaintiffs may (as they did here) accuse a pesticide manufacturer of engaging in a vague "unconscionable commercial practice * * * in relation to [its] marketing and pricing strategies" (Br. in Op. App. A1), while proving their case (as they also did here) by inundating the jury with testimony that EPA-approved labels were "false" and "deceptive." Respondents also say that, in doing so, plaintiffs may preclude the jury from receiving instructions on the FIFRA and EPA rules *authorizing or mandating use of those very labels*. If respondents are correct, it is inevitable

that juries will hold manufacturers liable under state law for mislabeling pesticides in circumstances where the manufacturer could not "also [be] liable for misbranding as defined by FIFRA." *Bates*, 544 U.S. at 454. Approving this sort of semantic hair-splitting – as did the court below – will lead to the very result that *Bates* meant to forestall.

Perhaps because they recognize the flaws in their position on the merits, respondents place principal weight on their contention that BASF waived its jury instruction argument below. Br. in Opp. 2, 5-6, 29. This contention is insubstantial. We explained in the petition (at 23 n.6) that *Bates* itself first expressly articulated the federal-law entitlement to FIFRA instructions in cases like this one; as a consequence, even if BASF had not advanced its jury instruction argument prior to *Bates* (which it did), as a matter of federal law BASF "should [have] be[en] allowed to address those matters on remand" from this Court after *Bates* was decided. 544 U.S. at 453 n.27.[4] The state court accordingly was not free to decline to address BASF's entitlement to FIFRA instructions, and that court's waiver analysis does not present an independent state ground that precludes review in this Court. Although we made this point in the petition, respondents make no response at all. The Court should not countenance this attempt circumvent the Court's ruling in *Bates*.

C. The Holding Below Violates The First Amendment

The short shrift respondents give to the First Amendment question presented in the petition should not disguise the importance of the issue or the magnitude of the lower court's

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[4] As we explain in the petition (at 23 n.6), BASF *did* properly advance its jury instruction argument below. In addition, as we also explain (see *ibid.*), the Minnesota court's waiver analysis is interwoven with federal law and therefore cannot serve as an independent state ground that precludes review in this Court.

error. Respondents appear to acknowledge the essential elements of BASF's First Amendment claim. They recognize that BASF's speech – the magazine article it sponsored describing the sanctions for off-label use of pesticides and its complaints of possible off-label use to law enforcement authorities – was a basis for the jury's finding that BASF engaged in "unconscionable commercial practices." Indeed, respondents emphasize the centrality of BASF's speech to their theory of liability. See Br. in Opp. 16-17, 18. Respondents likewise do not deny that BASF's speech was entirely truthful, a point they conceded below. See Pet. 8, 24. And they do not take issue with our argument that the holding below conflicts with the rulings of federal courts of appeals and state courts of last resort, which have held that truthful speech may not be used to establish liability under laws targeting unfair business practices. See Pet. 26.

In nevertheless opposing review, respondents contend that "[f]raudulent marketing representations are never protected speech." Br. in Opp. 30.[5] That observation is wholly beside the point here. The decisions cited by respondents involved "misleading affirmative misrepresentations." *Illinois ex rel. Madigan* v. *Telemarketing Assocs., Inc.*, 538 U.S. 600, 618 (2003); see *id.* at 608-609.[6] In contrast, respondents here used concededly *truthful and nonmisleading* speech to establish liability for an "unconscionable commercial practice."

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[5] Respondents' contention that BASF waived the First Amendment argument (Br. in Opp. 1, 2) is frivolous. The issue was presented in BASF's pre-*Bates* petition to the Minnesota Supreme Court (see Pet. 9) and in its first petition to this Court. Although the issue was not entertained by the Minnesota court on remand from this Court after *Bates*, in an abundance of caution BASF expressly noted below that it preserved the issue. See Minn. Sup. Ct. Br. 18 n.5.

[6] The decisions other than *Telemarketing Associates* cited by respondents at Br. in Opp. 30 simply observe that misleading commercial speech is not entitled to constitutional protection.

This Court has never suggested that truthful speech may be punished in such circumstances. Indeed, the Court's warning that "[s]imply labeling an action one for 'fraud,' of course, will not carry the day" (*id.* at 617), is aimed directly at arguments like the one advanced by respondents here.

In *Nike*, five Justices identified the danger that punishing truthful speech will chill valuable communication as a matter of serious concern. See Pet. 28-30. Respondents maintain that *Nike* was materially different from this case because, unlike the *Nike* plaintiff, they have no "ideological" ax to grind. Br. in Opp. 30. But that argument, too, is beside the point. The possibility that valuable debate will be suppressed must be viewed from the perspective of the defendant, whose speech is being curtailed. And BASF's speech here – valid complaints to public authorities and an accurate magazine article addressing what respondents concede to be matters of "public concern" (see Pet. 24) – deserves at least as much constitutional protection as *Nike*'s paid advertisement.

There is no gainsaying the practical importance of the issue presented here – and respondents do not deny it. Any number of accurate statements may be made the basis for liability under the holding below, and all commercial actors will be forced to limit their speech for fear of triggering damages liability under standardless state consumer laws. Respondents argued below that "the consumer fraud act cannot be trumped by the First Amendment" (10/11/01 Mot. in Lim. Tr. 176:3-4), and that is now the law in Minnesota. In these circumstances, "[t]he interest in protecting such participants [in public debate] from the chilling effect of the prospect of expensive litigation is * * * a matter of great importance." *Nike, Inc. v. Kasky* 539 U.S. 654, 664 (2003) (Stevens, J., concurring). Further review therefore is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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RONALD PETERSON, *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Minnesota

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE AS *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") respectfully requests leave to file the attached brief *amicus curiae* pursuant to Court Rule 37.2. Petitioner has consented to the filing of this brief, but respondents have withheld consent.

The Chamber is the world's largest federation of businesses and individuals, with more than three million businesses of every size, in every sector, and from every region. It regularly represents its members by filing *amicus* briefs in cases of national concern to American business.

The Chamber and its members have a strong interest in this case because the Minnesota courts significantly curtailed freedom of speech by holding that a corporate defendant can be held liable for "consumer fraud," *notwithstanding the truthfulness of its "commercial speech."* This holding is so extreme that it turns every corporate utterance into a potential predicate for treble damages, insofar as a jury might find the company's *truthful* speech to be "unconscionable" under an admittedly "amorphous" state consumer protection statute. *See* Pet. App. 74a.

A substantial amount of speech is at jeopardy. If BASF's speech in this case (including a truthful and non-misleading submission to a reputable trade publication and truthful information submitted to a government agency) can be used to support liability under state consumer protection laws, then a great deal of accurate corporate speech will be fair game for "consumer fraud" actions when alleged to be "for the wrong purpose." Pet. 8, 25. For example:

> fast-food companies often encourage children to exercise and stay in school;
>
> energy companies support conservation and efforts to develop alternative fuel sources;

alcoholic beverage manufacturers encourage consumers to drink responsibly;

athletic apparel companies trumpet financial contributions to after-school programs; and

television stations run advertisements that encourage students to read.

Conduct that was once lauded as "good corporate citizenship" could be considered *prima facie* "fraudulent," on the theory that consumers would not heed the corporate speaker's message if they understood that the speech was motivated (at least partially) by profit.

This case represents a particularly egregious example of state consumer protection litigation run amok. Applying a New Jersey statute to BASF's nationwide conduct, the Minnesota courts have punished truthful, non-misleading speech on the basis that it furthered (in the jury's view) an unfair commercial practice. Because speech by corporations is increasingly disseminated nationwide and even worldwide, the decision below would threaten speech around the globe. In light of the Chamber's strong interest in defending its members against this assault on their freedom of speech, the Chamber seeks leave to file this brief as *amicus curiae*.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*

The interest of the *amicus curiae* is described in the foregoing Motion for Leave to File.[1]

SUMMARY OF ARGUMENT

For years, the Court has sent conflicting signals on the proper definition of "commercial speech." The resulting jurisprudential uncertainty has led the lower courts to take widely diverging approaches in determining when corporate speech is subject to reduced protection under the First Amendment. In this case, the decision below deepens that conflict by treating a breathtakingly broad class of speech as "commercial," which menaces our system of free expression. According to Minnesota's courts, commercial speech includes all statements of fact: (i) made by persons engaged in commerce (including all businesses and their public relations firms); (ii) made to an audience including actual or potential purchasers of their products (including readers of a trade journal); and (iii) addressing any matter in which the speaker has some form of commercial interest (including truthful discussion of the illegal, off-label use of pesticides).

Whatever the correct test may be, this surely is not it. From its inception, the "commercial speech" doctrine was designed to broaden the First Amendment's reach by granting limited constitutional protection to product advertisements previously held unprotected. But now, the Minnesota courts have treated speech as "commercial" to *restrict* freedom of speech by subjecting speech at the First Amendment's core – including *undeniably true* speech – to

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[1] Pursuant to S. Ct. R. 37.6, the undersigned counsel for the *amicus curiae* state that they alone authored this brief, and no other persons or entities made any monetary contribution to its preparation or submission.

the reduced level of protection accorded to "commercial" speech. This makes no sense; at a barebones minimum, such speech must address the attributes of the company's products or services, as opposed to general discussion on topics of public concern in trade journals or reports to government agencies. Otherwise, speech that lies at the core of the First Amendment will be relegated to its periphery.

The Court should also grant *certiorari* to confirm that even if this kind of speech is to be classed as "commercial speech," that label, without more, is not dispositive of the applicable level of constitutional protection. The Court has sent conflicting signals on that issue, and this case presents an excellent vehicle for the Court to address the increasing uncertainty by holding that the "commercial speech" label is not a license for using *truthful* speech as the foundation for a "consumer fraud" action. *See Peterson II*, Pet. App. 46a-47a (holding truthfulness is an affirmative defense to libel charges but not to consumer fraud charges).[2]

These are precisely the kinds of issues that the Court sought to resolve in *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003), before it ultimately dismissed the case as improvidently granted. *See id.* The issues remain just as urgent in the wake of that result, and this case presents a clean vehicle for the Court to address them definitively.

The Court's guidance on these crucial questions is urgent for the entire business community. As matters stand, the lower courts' uncertainty regarding the definition and

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[2] The Minnesota Supreme Court refused to review the Court of Appeals' holding that the First Amendment was inapplicable to BASF's speech, making the intermediate appellate court's decision in *Peterson II* the final state court ruling on the issue. The Court of Appeals' decision in *Peterson II* is reprinted at Pet. App. 25a-53a.

treatment of commercial speech is chilling speech on important public policy matters that should be encouraged, not discouraged. Moreover, the increasingly nationwide and international scope of corporate speech and consumer class actions means that many corporate speakers are effectively bound by the stultifying laws of the least-protective jurisdiction. The Court's clarifying guidance is needed now.

ARGUMENT

I. THE COURT'S GUIDANCE IS NEEDED ON THE DEFINITION OF COMMERCIAL SPEECH.

This case presents an excellent opportunity to address the confusion and division generated by this Court's past pronouncements on the definition of "commercial speech."

A. The Court's Precedents Have Generated Substantial Uncertainty About the Definition of "Commercial Speech."

The Court has announced at least three different tests for determining whether speech is "commercial." The Court has "usually defined" commercial speech as "speech that does no more than propose a commercial transaction." *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001) (emphasis added). At times, however, the Court has announced a more expansive test: that "expression related solely to the economic interests of the speaker and its audience" is commercial. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980). The Court employed yet a third test in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), by considering three factors: whether the communication was an advertisement; whether it referred to a specific product or service; and whether the speaker had an economic motivation for the speech. *See id.* at 66-68. The *Bolger*

Court added to the indeterminacy of these precedents by indicating that speech is not necessarily commercial even if all three factors are met, and conversely that speech can be commercial even if all three factors are not met. *See id.* at 66-67 & n.14.

This Court has acknowledged the inconsistency and indeterminacy of these and other precedents:

> [W]e have stated that speech proposing a commercial transaction is entitled to lesser protection than other constitutionally guaranteed expression. We have also suggested that such lesser protection was appropriate for a somewhat larger category of commercial speech – "that is, expression related solely to the economic interests of the speaker and its audience." We did not, however, use that definition in either *Bolger* or in *[Board of Trustees v. Fox,* 492 U.S. 469 (1989)] . . . In *Fox*, we described the category even more narrowly, by characterizing the proposal of a commercial transaction as *"the test* for identifying commercial speech."

City of Cincinnati v. Discovery Network, 507 U.S. 410, 422-23 (1993) (emphasis original; citations omitted). The court chose not to resolve this inconsistency, however, because the parties agreed that the speech at issue in that case was commercial. *See id.* at 416.

The ambiguity left in the wake of *Discovery Network* has been exacerbated by subsequent commercial speech cases. For example, the Court accepted as "commercial speech" statements on an attorney's letterhead and business cards identifying the attorney as a certified public accountant and certified financial planner, *see Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy,* 512 U.S. 136, 142 (1994), a statement of alcohol content on

the label of a beer bottle, *see Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481-482 (1995), and truthful statements about the retail prices of liquor, *see 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). None of these statements fits comfortably within the definition of "commercial speech" established in *United Foods, Central Hudson,* or *Bolger*.

Lower courts and commentators have expressed frustration with this continuing uncertainty, which the Court tried but failed to resolve in *Kasky*. The Second Circuit, for example, has lamented the "doctrinal uncertainties left in the wake of Supreme Court decisions from which the modern commercial speech doctrine has evolved." *Bad Frog Brewery, Inc., v. New York State Liquor Auth.*, 134 F.3d 87, 94 (2d Cir. 1998). Commentators agree that this Court's "attempts to define 'commercial speech'" are "more ad hoc than the source of any real guidance." Jean Wegman Bums, *Confused Jurisprudence: False Advertising Under the Lanham Act*, 79 B.U.L. REV. 807, 831-32 (1999); *see also* Robert Post, *The Constitutional Status of Commercial Speech*, 48 U.C.L.A. L. REV. 1, 5 (2000) (noting the "boundaries" of commercial speech are "quite blurred").

B. The Lower Appellate Courts Are in Conflict on the Definition of "Commercial Speech."

The indeterminacy of the Court's precedents has inevitably led to a conflict among various federal courts of appeals and state courts of last resort. The Seventh Circuit has concluded that while "[i]t is not for us to proclaim the official demise of the *Central Hudson* test" for commercial speech, "we will not rush to endow that standard with a greater scope than the traditional definition" of "speech which does *no more than propose a commercial transaction*." *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 684-85 (7th Cir. 1998) (emphasis added). In doing so, the Seventh Circuit,

speaking through now-Chief Judge Flaum, expressed concern about "the incredible breadth of the *Central Hudson* test if taken to its literal extremes." *Id.* at 684.

The Ninth Circuit has imposed an especially stringent variant of the *Virginia Pharmacy* test. After determining that this Court's *Discovery Network* decision "cast serious doubt upon [*Bolger*]," the Ninth Circuit concluded that it should limit commercial speech to traditional advertising. *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 710 (9th Cir. 1999). As the court explained its approach, "[t]his simply is not a case of 'I will sell you X at the Y price.' Under *Discovery Network*, that observation alone suffices to classify the expression as non-commercial." *Id.* (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Council, Inc.*, 425 U.S. 758, 762 (1976). Although the Ninth Circuit later granted *en banc* review in *Thomas*, the 11 member *en banc* court dismissed the case on ripeness grounds without reaching or commenting on the commercial speech issue. *See Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134 (9th Cir. 2000) (*en banc*). Thus, Judge O'Scannlain's panel opinion on that issue remains "persuasive authority" in the Ninth Circuit. *See Roe v. Anderson*, 134 F.3d 1400, 1402 (9th Cir. 1998), *aff'd sub nom. Saenz v. Roe*, 526 U.S. 489 (1999).

Perhaps for that reason, at least two subsequent panels of the Ninth Circuit have held speech to be noncommercial under similarly restrictive tests. In *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001), the court held that the speech at issue was not commercial because it did not appear "*in a traditional advertisement printed merely for the purpose of selling a particular product.*" *Id.* at 1185 (emphasis added). The court further explained that "[t]here are commonsense differences between speech that does no more than propose a commercial transaction and other varieties, and common

sense tells us that this is not a simple advertisement." *Id.* at 1185-86 (internal quote and citation omitted) . *See also Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 906 (9th Cir. 2002) ("If speech is not 'purely commercial' – that is, if it does more than propose a commercial transaction – then it is entitled to full First Amendment protection.").

The Tenth Circuit has also held that "commercial speech is best understood as speech that merely advertises a product or service for business purposes." *Cardtoons, L.C. v. Major League Baseball Players' Ass'n*, 95 F.3d 959, 970 (10th Cir. 1996). Because the speech at issue in *Cardtoons* did not "merely advertise[] a product or service," the Tenth Circuit held that it was not "commercial speech." *Id.*

In contrast to these circuits that have followed variants of the *Virginia Pharmacy* test, other circuits have followed an expansive version of the *Bolger* test. *See, e.g., Procter & Gamble Co. v. Amway*, 242 F.3d 539 (5th Cir.), *cert. denied*, 534 U.S. 945 (2001); *Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109 (8th Cir. 1999). In *Procter & Gamble*, one company made statements about a competitor's business operations – specifically, about whether the competitor donated its profits to the Church of Satan – and suggested that consumers boycott the competitor's products for that reason. Under *Bolger*, the Fifth Circuit concluded that this was "commercial speech" if the speaker "acted *substantially* out of economic motivation." 242 F.3d at 552-53 (emphasis in original). The court of appeals reasoned that the second *Bolger* factor was satisfied by references to the competitor's products, and "[t]he first factor – whether the speech is an advertisement seems to collapse into the third factor," which is the speaker's motivation. *Id.* The Fifth Circuit thereby held that even boycott-related speech, as opposed to traditional product advertising, can be considered commercial speech.

In contrast to the variants of the *Virginia Pharmacy* test applied by the Seventh, Ninth, and Tenth Circuits, and in contrast to the expansive *Bolger* test fashioned by the Fifth Circuit, the Minnesota courts added to the general confusion by ignoring the need for multi-part tests altogether. According to the courts below, every speech-act made by or on behalf of a company enjoys reduced constitutional protection, at least to the extent that it fails to disclose its profit margins. *See Peterson I*, Pet. App. 87a (plaintiff may claim damages for "consumer fraud" even based on truthful speech if he "lost the opportunity to refuse to buy [the defendant's products] because [he was ignorant] of the large profit [the defendant] would make" on the transaction).

The resulting instability is especially manifest in this case, because the speech that BASF sought to exclude under the First Amendment is not "commercial" under the tests applied by other courts. Clearly BASF's magazine article did not merely "propose a commercial transaction." *Commodity Trend Serv.*, 149 F.3d at 684-85. Indeed, it said nothing resembling "'I will sell you X at the Y price.'" *Thomas*, 165 F.3d at 710. Nor did it constitute "a traditional advertisement." *Hoffman*, 225 F.3d at 1185. It certainly did not "merely advertis[e] a product or service." *Cardtoons* ,95 F.3d at 970. Instead, BASF's public relations firm made general and truthful statements about illegal off-label pesticide use, without mentioning BASF or its products, and without offering any prices or terms of sale. *See* Pet. 6-9.

By holding such speech to be commercial, the Minnesota courts ruled in conflict with the federal circuits that follow variants of the *Virginia Pharmacy* test. Their decision reaches even farther than the Fifth Circuit's application of the *Bolger* test, inasmuch as BASF's article made no mention of its products. Indeed, the lower court's decision in this case reaches even farther than the California Supreme Court's troublesome decision in *Kasky*, which held

that speech may be deemed "commercial" solely because of the speaker's economic motivations. *See* 45 P.3d 243 (Cal. 2002), *cert. dismissed*, 539 U.S. 654 (2003). This jurisprudential misunderstanding has persisted long enough; the Court should take this opportunity to forestall further confusion about the proper scope of constitutional protection for speech on such matters of public concern.

C. The Court Should Address the Speech Issues and Hold that, At a Minimum, Only Speech About the Attributes of Goods or Services for Sale Can Be Considered "Commercial."

This case presents an especially valuable vehicle for addressing the lower courts' confusion about the definition of "commercial speech." While line-drawing in this area may be difficult in some respects, this case turns on an obvious line: only speech advertising the attributes of products or services for sale can be considered "commercial" speech. In contrast, speech that addresses business operations in general, or other matters of public policy or public concern, should be accorded the full First Amendment protections enjoyed by all other participants in those debates.

1. The History of the "Commercial Speech" Doctrine Demonstrates that It Addresses Only the Advertising of Products and Services, Not Corporate Speech Generally.

This line is strongly supported by the history of the "commercial speech" doctrine, which shows that the doctrine was intended to *grant* limited protection to product advertising, not to *limit* the protections already applied to other types of corporate speech. The Court developed the modern "commercial speech" doctrine in the 1970s in response to its earlier holding that "the Constitution imposes no . . . restraint on government as respects *purely*

commercial advertising." *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (emphasis added). Specifically, the Court gave birth to the doctrine by overruling *Valentine* and holding that "commercial speech, like other varieties, is protected." *Virginia Pharmacy*, 425 U.S. at 760-61.

In doing so, the Court made clear that "commercial speech" was referring only to the narrow kind of product advertisement addressed in *Valentine*:

> [T]he question whether there is a First Amendment exception for "commercial speech" is squarely before us. Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. *The "idea" he wishes to communicate is simply this: "I will sell you the X prescription drug at the Y price." Our question then, is whether this communication is wholly outside the protection of the First Amendment.*

Id. at 760-61 (emphasis added). From its genesis, therefore, the "commercial speech" doctrine was designed to address speech that does *not* "editorialize on any subject," "report any particularly newsworthy fact," or "make generalized observations . . . about commercial matters." *Id.* Instead, it was designed to give limited *protection* to speech that does "*no more* than propose a commercial transaction." *Id.* at 761, 762 (internal quotation omitted).

Significantly, the speech at issue here – on public policy matters involving corporations – was fully protected long before the Court extended any protection to "commercial" speech. As early as 1940, the Court held that self-interested speech "concerning the conditions in industry

and the causes of labor disputes" is protected by the First Amendment, because it is "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." *Thornhill v. Alabama*, 310 U.S. 88, 103 (1940); *see also Thomas v. Collins*, 323 U.S. 516 (1945). Thus, speech about business operations generally – as opposed to product advertising – has always received full First Amendment protection, not the limited protection later devised for "commercial speech."

The Court has never departed from this understanding. To the contrary, the Court has repeatedly recognized that the advertisement of products or services – as opposed to business operations generally – is the *sine qua non* of "commercial speech." Thus, the Court explained in the early years of the "commercial speech" doctrine that such speech "serves to inform the public of the availability, nature, and prices of products and services," *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977), because it "relates to a particular product or service." *Friedman v. Rogers*, 440 U.S. 1, 10 (1979); *see also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507 (1981) (referring to "commercial speech" as "commercial price and product advertising"). More recently, the Court confirmed: "The entire commercial speech doctrine. . . represents an accommodation between the right to speak and hear expression about *goods and services* and the right of government to regulate the sales of such goods and services." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996) (plurality opinion) (quotation omitted) (emphasis added and omitted).

In keeping with this long-established understanding of the "commercial speech" doctrine, this Court (unlike the Minnesota state courts) has "always been careful to distinguish commercial speech from speech at the First Amendment's core." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995). For example, the Court has held that

while a manufacturer's speech about the attributes of a specific product is "commercial" regardless of whether it is linked to a public debate, *see Bolger*, 463 U.S. at 67-68, an energy company's speech to its customers about energy conservation is not "commercial." *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 8-9 (1986) (plurality opinion). Such speech "extends well beyond speech that proposes a business transaction and includes the kind of discussion of matters of public concern that the First Amendment both fully protects and implicitly encourages." *Id.* (internal citations and quotations omitted).

2. BASF's Speech Is Fully Protected.

Far from advertising its products' attributes, BASF's magazine article in *Sugarbeet Grower* presented truthful discussion about regulatory matters of great importance to its audience – the illegal, off-label use of pesticides on "minor" crops – as did the reports it submitted to government authorities. This is speech at the core of the First Amendment, not the type of "commercial speech" that was excluded altogether from First Amendment protection prior to *Virginia Pharmacy*. *See, e.g., Thornhill*, 310 U.S. at 103.

Indeed, corporations are generally accorded the same free speech rights as other speakers precisely because the First Amendment is designed to protect the public's access to information, and "[t]he inherent worth of. . . speech in terms of its capacity for informing the public does not depend upon the identity of its source." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978). Suppressing speech merely because the speaker is a corporation runs contrary to our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

This should be an easy case. Instead of making statements connected with the sale of Poast Plus, the article addressed the changing regulatory environment for off-label pesticide use as part of a general debate on matters of public concern. Similarly, the reports simply brought unlawful conduct to the agency's attention. Accordingly, BASF's speech falls well outside the "commercial speech" category.

II. THE COURT'S GUIDANCE IS NEEDED ON THE TREATMENT OF COMMERCIAL SPEECH.

Even if the Court considered BASF's speech to be "commercial," that should not be the end of the matter. The Court has sent conflicting signals on whether the "commercial speech" label alone dictates the applicable level of constitutional protection, or whether further analysis is required. The Court should take this opportunity to confirm that this label does not invariably trump all other strands of First Amendment jurisprudence, especially the fundamental prohibition against discrimination among speakers.

A. The Court Has Sent Conflicting Signals on the Treatment of "Commercial Speech."

In Section IA, above, the Chamber addressed the conflicting signals that the Court has sent on the definition of "commercial speech." The Court has also "followed an uncertain course" in determining what level of protection to accord speech that has been determined to be "commercial." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 574 (2001) (Thomas, J., concurring). In some cases, the Court has held that the "mere fact" that speech is commercial "does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress" it. *44 Liquormart*, 517 U.S. at 501; *see also, e.g., Discovery Network*, 507 U.S. at 424 (emphasizing that courts must be careful not to "place too much importance on the distinction between commercial and

noncommercial speech"). But in other cases (and especially in older cases), the Court has held the "commercial speech" label to be dispositive of the level of protection accorded the speech. *See, e.g., Central Hudson*, 447 U.S. at 561-66.

The Court's most recent precedents have only added to the uncertainty. In *United Foods*, this Court noted that precedents which "accord less protection to commercial speech than to other expression" have "been subject to some criticism." 533 U.S. at 409-10 (citing opinions of Stevens and Thomas, JJ.). But the Court concluded that it "need not enter into the controversy" because the restriction at issue in that case could not be upheld under any standard. *Id.* at 410. In *Lorillard*, the Court recognized that a *majority* of the Justices have criticized *Central Hudson*, but again concluded that the traditional test sufficed for purposes of that case. *See* 533 U.S. at 554-55; *see also id.* at 571 (Kennedy, J., joined by Scalia, J., concurring) (emphasizing that in view of the "obvious overbreadth" of the restriction at issue, the Court was not required *in that case* "to consider whether *Central Hudson* should be retained in light of the substantial objections that can be made to it"); *id.* at 575 (Thomas, J., concurring) ("there is no philosophical or historical basis for asserting that commercial speech is of lower value than noncommercial speech") (internal quotation omitted).

Similarly, in *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002), the Court again noted that "several Members of the Court have expressed doubts about the *Central Hudson* analysis," but found that the issue had not been raised in that case. *Id.* at 367-68. Most recently, in *Kasky*, the Court declined on procedural grounds to reconsider the "potentially conflicting principles" underlying *Central Hudson*, though three Justices sought to revisit these issues. *Id*, 539 U.S. at 684 (Breyer and O'Connor, JJ., dissenting); *see id.* at 665 (Kennedy, J., dissenting).

This state of affairs has led to unfortunate results. In *Procter & Gamble*, the Fifth Circuit held that a corporation's speech about a competitor's religious affiliation could be deemed false "commercial speech" entitled to *no* First Amendment protection, even though this speech "touched on the type of issues that are at the heart of First Amendment protections, namely: religious issues and issues of how corporations act and influence society." 242 F.2d at 550. Judge Smith, the author of the court's opinion, went out of his way to emphasize that he questioned this result. *See id.* at 557-59. But he determined that his hands were tied by this Court's controlling precedents. *See id.* at 557-58.

Judge Smith's efforts to grapple with the contours of this Court's jurisprudence are admirable in contrast with the cursory – and astoundingly fallacious – approach adopted by the Minnesota courts below. Instead of considering the complexities of these precedents, the court in *Peterson II* concluded that the First Amendment provides *absolutely no* protection for a company's speech in a "consumer fraud" case, even on an issue of acknowledged public concern. The reasoning for this conclusion was no more than tautological definition: the First Amendment does not apply, the court said, simply because "this is a consumer fraud action, not a defamation action." *Peterson II*, Pet. App. 47a; *see also id.* at 46a-47a ("Here, there is no claim that the reports that BASF seeks to protect were defamatory. . . . This consumer fraud action, however, does not raise a libel claim."). To support this incredibly skimpy analysis, the court cited only its prior decision in a patent case. This Court, by contrast, rejected this very approach of "censorship by classification" in cases such as *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (applying constitutional "actual malice" standard to tort action for emotional distress), and *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (same in tort action for invasion of privacy). The urgent need for the Court's guidance on the free speech issues presented here – that are now being raised

in consumer protection actions brought as class actions on behalf of many individual plaintiffs – could not be more apparent. *See, e.g., Kasky*, 539 U.S. at 681-83 (Breyer, J., dissenting) ("refusal immediately to review the state-court decision before us will 'seriously erode' the federal constitutional policy in favor of free speech" and "may well 'chill' the exercise of free speech rights" because "waiting extracts a heavy First Amendment price").

B. The Court Should Take the Opportunity to Hold that the "Commercial Speech" Label Alone Does Not Fix the Level of Constitutional Protection.

This case provides an important opportunity to address the proper treatment of commercial speech. Although no comprehensive reassessment of *Central Hudson* is required to decide this case, the Court would foster the fundamental values underlying freedom of speech by confirming that each speaker on matters of public concern is to be treated equally under the law, regardless of whether the speaker is deemed to be engaging in "commercial" speech. This is familiar terrain; a neutrality principle has long been embedded in the Court's First Amendment jurisprudence so that the government may not discriminate among speakers by "licens[ing] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V. v. St. Paul*, 505 U.S. 377, 392 (1992).

Yet that is precisely the result ordained by the Minnesota courts here, when they concluded that the First Amendment has no place in a "consumer fraud" action. Therefore, the Court should take this opportunity to hold that even if a corporation's speech on a public policy matter is deemed to be "commercial speech," it cannot be punished without the same showing of fault (be it negligence or actual malice) that is required in an action brought against any other participant in the public debate (such as a defamation

suit brought by the corporation). *Cf Kasky*, 539 U.S. at 680 (Breyer, J., dissenting) (such laws create "concern that the commercial speaker engaging in public debate suffers a handicap that noncommercial opponents do not").

A contrary conclusion would leave First Amendment freedoms hanging by too slender a thread. In this case, the *Sugarbeet Grower* article was plainly not "commercial" because it did not address the attributes of goods or services that BASF offered for sale. But typically, the determination whether speech is "commercial" turns on "a matter of degree." *Discovery Network*, 507 U.S. at 423. Indeed, Justice Thomas doubts "whether it is even possible to draw a coherent distinction between commercial and noncommercial speech." *Lorillard*, 533 U.S. at 575 (Thomas, J., concurring); *see Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (Stevens, J., concurring) (noting the "artificiality of a rigid commercial/non-commercial distinction"); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 628 (1990) ("commercial/noncommercial distinction makes no sense").

Under the holding in *Peterson II*, however, a distinction that often rests on a minor difference in degree is transformed into a major difference in kind. If BASF's speech is not commercial, then it is entitled to full First Amendment protection. But if it *is* commercial, then it is entitled to *no* protection, at least when it is challenged in a "consumer fraud" action. Especially given the tenuousness of the distinction between commercial and noncommercial speech, and the enormity of the stakes in "consumer fraud" cases, this sharp disparity in treatment makes little sense. The Court tried to address these free speech issues recently, but ultimately left them unresolved. *See Kasky*, 539 U.S. at 663 (Stevens, J., concurring) ("This case presents novel First Amendment questions because the speech at issue represents

a blending of commercial speech, noncommercial speech and debate on an issue of public importance.").

Of course, the simplest way to resolve this case would be to hold that BASF's speech was not "commercial." But if this Court were to hold that the speech at issue was commercial, then it should also hold that the status of this speech as "commercial" speech is not dispositive of the level of constitutional protection afforded. Instead, the bedrock neutrality principle dictates that however BASF's speech is labeled, it must be treated the same as all other speech that occurs in the course of the same public policy debate.

III. THE COURT'S REVIEW IS NEEDED TO PREVENT IMMEDIATE AND NATIONWIDE SUPPRESSION OF SPEECH ON IMPORTANT PUBLIC POLICY MATTERS.

The Court's plenary review in this case is needed to prevent immediate harm. The confusion spawned by the Court's "commercial speech" precedents makes it extremely difficult for corporate counsel to determine which statements are fully protected and which are not. Such uncertainty can only "inhibit the exercise of [First Amendment] freedoms" by "lead[ing] citizens to steer far wider of the unlawful zone . . . than if the boundaries were clearly marked." *Grayned v. City of Rockford*, 408 U.S.. 104, 109 (1972) (quotation omitted); *see also Kasky*, 539 U.S. at 667 (Breyer, J., dissenting) ("delay itself may inhibit the exercise of constitutionally protected rights of free speech without making the issue significantly easier to decide later on").

The decision below heightens the need to clarify the proper boundaries of the Court's free speech doctrines. The increasingly nationwide nature of corporate speech means that the law of the least-protective jurisdiction effectively governs statements made by corporations everywhere. If one

jurisdiction can punish this kind of speech in a consumer class action, then as a practical matter, speakers nationwide will be prevented from disseminating such speech at all.

The upshot of the ruling below is that most corporate speech can be classified as "commercial" speech, including all statements of fact: (i) made by persons engaged in commerce (including all businesses); (ii) made to an audience that includes actual or potential purchasers or users of their products; and (iii) addressed to any matter in which the speaker has a commercial interest (including a trade journal article or government report), even if that speech is focused on a public policy matter of obvious public concern. As a result, companies now face the unhappy choice of either remaining quiet on important public policy debates concerning their own operations, or facing liability for any statements made in the context of heated and fast-moving debate, simply because they have a commercial interest in the issues being debated. The risks of being sued and found liable are far from trivial, since many state consumer protection laws have relaxed the constraints on traditional fraud actions – such as proof of *scienter* and reliance.

This regime cannot be squared with bedrock principles of free speech. The decision below forces responsible corporate citizens to curtail their involvement in public debate, lest they risk a consumer fraud lawsuit premised on "impure" corporate motivations. For example:

> fast-food companies often encourage children to exercise and stay in school;
>
> energy companies support conservation and efforts to develop alternative fuel sources;
>
> alcoholic beverage manufacturers encourage consumers to drink responsibly;

athletic apparel companies trumpet financial contributions to after-school programs; and

entertainment companies run advertisements that encourage students to read.

Under the rulings below, these types of speech create potential liability for an award of treble damages under state consumer protection laws. Yet in each instance, a corporate speaker addresses the American public (including its customers) on matters involving its own business operations, speaking truthfully on matters of public concern. Thus, if the Court were to deny *certiorari*, then companies nationwide (and even worldwide) could only speak on such matters if they were willing to risk such expansive application of state laws. The regime envisioned is utterly inhospitable to free speech and to the Constitution. This Court alone can and should make that dominant fact clear.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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No. 06-144

IN THE

Supreme Court of the United States

BASF CORPORATION,
Petitioner,

v.

RONALD PETERSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Minnesota

MOTION OF CROPLIFE AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF IN SUPPORT OF PETITIONER

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On Petition for a Writ of Certiorari to the Supreme Court of Minnesota

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Sup. Ct. R. 37.2(b), CropLife America hereby moves for leave to file the accompanying *amicus curiae* brief in support of the petition for a writ of certiorari. Counsel for Petitioner BASF Corporation has consented to the filing of the brief (a copy of Petitioner's written consent has been filed with the Clerk's office), but Respondents' counsel has withheld consent, thereby necessitating this motion.

CropLife America is the national trade association for the plant science industry. Its member companies produce, sell, and distribute virtually all of the agricultural crop protection pesticides, including herbicides, insecticides, and fungicides, which American farmers use to provide consumers with abundant food and fiber. The association is committed to safe and responsible use of the industry's products. To

achieve that objective, pesticide products must be used in accordance with nationally uniform product labeling regulated by the United States Environmental Protection Agency (EPA) pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA").

The subject of this appeal—FIFRA preemption of state-law damages claims that conflict with EPA's regulation of pesticide labeling—is of utmost importance to CropLife America and its members. During the past 15 years, the association has filed numerous *amicus curiae* briefs addressing the scope and application of FIFRA preemption. CropLife America submitted an *amicus* brief to this Court in *Bates v. Dow AgroSciences LLC*, 544 U.S. 431 (2005) (holding that FIFRA's preemption provision, 7 U.S.C. § 136v(b) ("Uniformity"), expressly preempts state law damages claims which impose requirements for labeling that diverge from, and are not substantially equivalent to, FIFRA's labeling requirements), and in support of BASF's pre-*Bates* certiorari petition here, see *BASF Corp. v. Peterson*, 544 U.S. 1012 (2005) (vacating and remanding for further consideration in light of *Bates*).

CropLife America seeks leave to file the accompanying *amicus curiae* brief in order to present its views on why the Minnesota Supreme Court's post-*Bates* remand opinion warrants review. From an industry-wide perspective, there are two principal reasons why review of this case is essential:

First, the state court misread *Bates* in a most fundamental and troublesome way. The Court should take this opportunity to clarify, for the benefit of lower courts and litigants in state-law pesticide damages suits, that *Bates* neither instructs nor allows a court to elevate the name, form, or plaintiff's characterization of a state-law cause of action (e.g., a "consumer fraud" claim) over its nature, elements, or substance (e.g., a claim based on a duty that conflicts with EPA's labeling regulations) to determine whether it imposes "requirements for labeling" for purposes of § 136v(b).

Second, the state court's preemption analysis undermines the structure and disrupts the operation of the federal/state pesticide regulatory scheme, whose principal purpose is to protect human health, the environment, and agricultural crop production. In particular, under the pretext of consumer protection, the opinion holds that a pesticide manufacturer can be held liable under state law for utilizing EPA-authorized subset labeling to identify the crops to which a herbicide may be safely applied, and for advocating compliance with FIFRA's crucial mandate that pesticides be used only in accordance with their labeling.

CropLife America believes that the discussion of these and related points in the accompanying *amicus* brief will be helpful to the Court in deciding whether to grant the certiorari petition. Therefore, this motion for leave to file the *amicus* brief should be granted.

Respectfully submitted,

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BRIEF OF CROPLIFE AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE* [1]

The interest of the *amicus curiae* is described in the accompanying motion for leave to file this brief.

SUMMARY OF ARGUMENT

Review should be granted because this case provides the Court with an ideal and timely opportunity to clarify a crucial aspect of the Court's opinion in *Bates v. Dow AgroSciences LLC*, 544 U.S. 431 (2005). More specifically, the Court

[1] Pursuant to Sup. Ct. R. 37.6, CropLife America states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

should grant review to end the widespread confusion surrounding *Bates* by making it clear that nothing in that opinion allows the name, form, or characterization given to a state-law cause of action by a plaintiff to govern whether the claim falls within the scope of FIFRA's preemption provision, 7 U.S.C. § 136v(b).

The Court held in *Bates* that a state-law damages claim imposes a "requirement for labeling" for purposes of § 136v(b) if the legal duty upon which the claim is premised would "set a standard" for a pesticide product's labeling, or require a product to be labeled in a "particular way." 544 U.S. at 444, 445, 446. The Court further indicated that "[r]ules that require manufacturers to design reasonably safe products, to use due care in conducting appropriate testing of their products, to market products free of manufacturing defects, and to honor their express warranties or other contractual commitments plainly do not qualify as requirements for 'labeling or packaging.'. . . Thus, petitioners' claims for defective design, defective manufacture, negligent testing, and breach of express warranty are not pre-empted." *Id.* at 444. In its post-*Bates* opinion on remand, the Minnesota Supreme Court misconstrued this statement to mean that any state-law claim whose name, form, or "characterization" is not "very directly related" or "directly addressed" to a pesticide product's labeling is *categorically* excluded from the preemptive scope of § 136v(b). Pet. App. at 13a. Based on this misreading of *Bates*, the state court failed to analyze the true nature of the legal duties underlying the Respondent farmers' claims, and instead, adopted the farmers' own superficial characterization of their claims as involving "nonlabel" conduct. *Id.* at 19a.

The recurring question of whether the Court in *Bates*, which is being hailed by the trial bar as a landmark realignment of the Court's tort preemption jurisprudence, intended to elevate form over substance and thereby enable a plaintiff to plead around preemption at will, has tremendous practical

importance for any type of pesticide or other state-law damages action where federal preemption is raised as an affirmative defense. While the urgent need to clarify (or correct) this aspect of *Bates* is reason enough to grant review here, the opinion below also warrants the Court's scrutiny because unless reversed, it will severely destabilize the underpinnings of the federal/state pesticide regulatory scheme, stifle innovative activity within the pesticide industry, and impair American farmers' already precarious ability to produce a broad variety of food crops in a cost-effective manner.

There are at least five reasons why the lower court's opinion turns the federal/state scheme on its head: *First*, contrary to *Bates*, the opinion allows individual juries to establish their own *divergent* state-law requirements for the content and format of a pesticide product's nationally uniform labeling, including with regard to listing the agricultural crops to which a product may be lawfully (and safely) applied. *Second*, the opinion transforms a voluntarily obtained FIFRA registration into both an unqualified license and a state law duty to sell a product throughout the United States for all of its federally registered uses; the opinion thereby encroaches upon each state's inherent authority to restrict, based on agricultural, environmental and other factors within its own borders, the sale and use of FIFRA-registered pesticides. *Third*, the opinion undermines FIFRA's fundamental prohibition against using a pesticide in a manner inconsistent with its EPA-approved labeling, such as by applying a product to crops that are not included on its labeling. *Fourth*, the opinion discourages adequate pre-market testing of pesticide products to ensure that they are safe and effective for use on particular types of crops in specific regions. *Fifth*, the opinion eliminates pesticide manufacturers' already tenuous economic incentives for developing and marketing products that are suitable for use on low-acreage "minor" crops such as fruits

and vegetables, which have high economic value to farmers and nutritional benefits for consumers.

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW TO CLARIFY THAT NO FORM OF STATE-LAW CAUSE OF ACTION IS CATEGORICALLY EXCLUDED FROM FIFRA PREEMPTION

In *Bates* this Court articulated a two-part, textually based test for determining whether a state-law damages claim falls within the preemptive scope of § 136v(b) of FIFRA:

> For a particular state rule to be pre-empted, it must satisfy two conditions. First, it must be a requirement "*for labeling or packaging*" . . . Second, it must impose a labeling or packaging requirement that is "*in addition to or different from* those required under this sub-chapter."

544 U.S. at 444 (quoting 7 U.S.C. § 136v(b)). Addressing the first prong, the Court rejected a label alteration "inducement test" as too subjective, indicating instead that "[a] requirement is a rule of law that must be obeyed . . . . The *proper inquiry* calls for an examination of the *elements of the . . . duty* at issue . . . ." *Id.* at 445 (emphasis added) (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 523-24 (1992) ("The central inquiry in each case is straightforward: we ask whether the legal duty that is the predicate of the . . . damages action constitutes a 'requirement' . . . ."). Further, "requirements for labeling" are rules which "require[] that manufacturers label . . . their products in [a] *particular way*," *id.* at 444 (emphasis added), in other words, "rules [that] *set a standard* for a product's labeling," *id.* at 446 (emphasis added).

1. The Opinion Below Fundamentally Misconstrues Bates. The Minnesota Supreme Court failed to conduct the

straightforward legal inquiry required by *Bates*. The state court did not ask whether, as a matter of law, the Respondent farmers' damages claims are predicated upon state-law rules that would "set a standard" for BASF's Poast Plus labeling, or require that the product to be labeled "in [a] particular way," for example, by requiring BASF, despite EPA's subset labeling regulation, to list *all* of the product's federally registered crops. Instead, the state court embarked upon the subjective, convoluted, fact-laden exercise of deciding which party's "characterization" of the claims is more accurate, and then allowed Respondents' self-serving characterization to define the nature of the state-law duties imposed by the claims. Plainly misreading *Bates*, the court erroneously asserted that

> in light of the Supreme Court's clarification of the appropriate FIFRA preemption standards, it has become even more apparent that the debate in this case is *not about . . . the legal standard imposed by application of the New Jersey statute* in the context of the farmers' claims. Instead, the fundamental debate is *simply about how the farmers' claims are accurately characterized.* Because we conclude that the *record supports the farmers' characterization* of their claims as based on nonlabel conduct, under *Bates*, there is no FIFRA preemption.

Pet. App. at 18a-19a (emphasis added).

Compounding this error, the opinion below rewrites § 136v(b) by adding the requirement "that state regulation must be *very directly related* to labeling . . . in order to invoke FIFRA preemption. . . . That is, FIFRA preemption applies only if the state requirement on which liability is based is *directly addressed* to labeling . . . ." *Id.* at 13a (emphasis added). This "very directly related" or "directly addressed" to labeling test, which is nowhere to be found in the text of § 136v(b) or in *Bates*, was the "crucial determinant" for the

lower court's conclusion that the farmers' claims should be characterized as being "based on BASF's marketing and advertising actions and not on the content of the product labels." *Id.* at 14a.

Rather than recognizing that the farmers' claims are predicated upon state-law duties that would set standards for Poast Plus labeling and require the product to be labeled in a particular way, the state supreme court's circular discussion of how the claims should be "characterized" merely reflects the consumer fraud veneer which Respondents have applied to their claims in an effort to circumvent § 136v(b).[2] Furthermore, by concluding that the "farmers . . . more accurately characterize the nature of the farmers' claims" as involving "nonlabel conduct," *id.* at 16a, 19a, the state court conveniently avoided the second prong of the *Bates* test, i.e., whether their claims are based on a "rule that would impose a labeling requirement that *diverges from* those set out in FIFRA and its implementing regulations." *Bates*, 544 U.S. at 452 (emphasis added). Had the court addressed this second question, it would have been difficult to reach any conclusion other than that Respondents' claims are based on state-law duties that widely diverge from EPA's labeling regulations, and therefore, establish a state-law standard for labeling that is "in addition to or different from" FIFRA's standards as implemented by EPA. *See* Pet. at 14-19. For the same reason, the state supreme court erred by failing to recognize that as mandated by *Bates*, 544 U.S. at 454, the trial court

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[2] *See, e.g.*, Pet. App. at 17a ("The duty the farmers' claims imposed on BASF was not to register and label Poast and Poast Plus as one product, but rather, having registered and labeled them separately, to refrain from deceptive statements about their EPA registration, their active ingredient composition, and their relative efficacy on major and minor crops."); *ibid.* ("[T]he farmers' claims do not challenge the legality of BASF's subset labeling, but rather its misrepresentations about the products, their registration, and their capacities . . . .").

should have instructed the jury regarding FIFRA's and EPA's labeling requirements.

2. This Court Should Clarify Bates by Explicitly Holding That Lower Courts Must Not Place Form Over Substance in Determining Whether a State-Law Cause of Action Is Preempted by § 136v(b) of FIFRA. Consistent with the plain language of § 136v(b), *Bates* clearly holds that a state-law claim must impose a "requirement for labeling" as the first condition for express preemption. 544 U.S. at 444. In other words, any claim that does not impose a "requirement for labeling" is categorically excluded from the scope of § 136v(b). The state court's supposedly "careful reading" of *Bates*, Pet. App. at 12a, goes astray, however, by reading into *Bates* a much broader categorical exclusion for virtually any type of state-law cause of action which does not *facially* attack a pesticide product's labeling. For example, the opinion below found it "significant that the Court [in *Bates*] also made the point that a state requirement applicable to oral statements does not qualify as a requirement for 'labeling or packaging' covered by section 136v(b)." *Ibid.* (citing *Bates*, 544 U.S. 445 n.17). Based on this Court's supposedly "narrow view of the 'labeling or packaging requirement' factor," *ibid.*, the state court indicated that "[t]he conduct at issue is analogous to the oral sales representations that the Supreme Court found in *Bates* to be outside the scope of FIFRA preemption." *Id.* at 17a; *see also id.* at 13a (referring to the Supreme Court's "refusal to view regulation of oral statements, even those that mirror label language, as requirements for labeling").

To be sure, the Court indicated in *Bates* that "[r]ules that require manufacturers to design reasonably safe products, to use due care in conducting appropriate testing of their products, to market products free of manufacturing defects, and to honor their express warranties or other contractual commitments plainly do not qualify as requirements for 'labeling or

packaging.'" 544 U.S. at 444. This statement, however, is not equivalent to a holding that state-law causes of action are *categorically* excluded from the preemptive scope of § 136v(b) merely because they are denominated as, or pleaded or presented in the form of, claims for defective design, inadequate testing, breach of warranty—or here, consumer fraud—*even if*, in a particular case, they are based on state-law rules that would set standards for a pesticide product's labeling or otherwise require a product to be labeled in a particular way.

Such a holding would represent a sea change in this Court's tort preemption jurisprudence, which establishes that the substance, not the form, of a state-law claim governs whether it is preempted. *See, e.g., Aetna Health Inc. v. Davilla,* 542 U.S. 200, 214 (2004) ("distinguishing between pre-empted and non-pre-empted claims based on the particular label affixed to them would *elevate form over substance* and allow parties *to evade the pre-emptive scope of [the statute]* simply by relabeling their . . . claims") (internal quotation marks omitted); *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 324 (1981) (preemption cannot be "avoided by mere artful pleading"). Because pesticide-related damages suits, now reinvigorated by *Bates*, continue to be a persistent feature of this nation's judicial landscape, the Court should grant review in order to clarify for the benefit of lower courts and litigants that *any* state-law damages claim—no matter how characterized, denominated, or formulated—that "set[s] a standard for a product's labeling," *Bates*, 544 U.S. at 446, or "requires that manufacturers label . . . their products in [a] particular way," *id.* at 444, imposes requirements for labeling within the scope of § 136v(b).

Prior to *Bates*, the federal courts of appeals had uniformly recognized that FIFRA preemption cannot be avoided merely by the "guise under which the claim is presented." *Netland v. Hess & Clark, Inc.*, 284 F.3d 895, 900 (8th Cir. 2002); *see*

also Grenier v. Vermont Log Bldgs., Inc., 96 F.3d 559, 564 (1st Cir. 1996) ("merely to *call* something a design or manufacturing defect claim does not automatically avoid FIFRA's explicit preemption clause"). Along the same lines, the federal courts widely had held that a state-law claim purporting to be based on an oral or other "off-label" statement that repeated information on a product's labeling necessarily imposed state-law requirements for the labeling itself. *See, e.g., Kuiper v. American Cyanamid Co.*, 131 F.3d 656, 662 (7th Cir. 1997) (farmers "cannot automatically avoid FIFRA preemption simply because they challenge alleged misrepresentations that were made separately from the label. . . . even off-label statements are preempted if they merely repeat information in the label itself."); *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555, 563 (9th Cir. 1995) (FIFRA preempts claim based on pesticide distributor's oral representation regarding crop safety where there was "no evidence establishing that [it] made any statements that were inconsistent with or went beyond the labels"); *Lowe v. Sporicidin Int'l*, 47 F.3d 124, 127-30 (4th Cir. 1995) (§ 136v(b) preempts claims based on "off-label" representations which do not "substantially differ" from the label).

Now, however, the Minnesota Supreme Court has misconstrued the *Bates* "requirement for labeling" discussion, 544 U.S. at 444-45, as holding that most types of state-law causes of action are categorically excluded from § 136v(b) simply based on the name, form, or characterization that a plaintiff assigns to them.[3] The state supreme court is not alone; other post-*Bates* decisions have made the same critical error. For example, in *Mortellite v. Novartis Crop Protection, Inc.*, No. 03-3847, 2006 WL 2390514 (3d Cir. Aug. 21, 2006), a pesticide-related crop damage case, the Third Circuit read

[3] The state supreme court acknowledged the Court held in *Bates* that fraud and negligent-failure-to-warn claims do impose requirements for labeling. *See* Pet. App. at 10a (citing *Bates*, 544 U.S. at 446).

Bates as *categorically* excluding strict liability, negligent testing, and breach of warranty claims, and also oral misrepresentation claims, from § 136v(b). *See id.*, at *4 ("As the Supreme Court explained, such common law claims plainly do not impose labeling requirements, and therefore cannot conflict with FIFRA."). Similarly, in *Wuebker v. Wilbur-Ellis Co.*, 418 F.3d 883, 886-87 (8th Cir. 2005), a pesticide-related personal injury case, the Eighth Circuit read *Bates* as *categorically* excluding design defect claims, and as a result, reversed a district court's pre-*Bates* holding that a purported design defect claim was actually based on a state-law duty to provide additional label warnings, and thus was preempted by § 136v(b). *See also Turner v. Chevron USA, Inc.*, No. B173622, 2006 WL 1314013, at *6 (Cal. Ct. App. May 15, 2006), *pet. for review denied* (Cal. Sup. Ct. Aug. 16, 2006) (No. 44553) (holding that "*Bates* puts to rest [the] contention that FIFRA expressly preempts Turner's claim for strict liability, design defect under the risk-benefit test," even though that test requires juries to examine the adequacy of label warnings). Not surprisingly, the trial bar has seized upon the same "requirement for labeling" passage in *Bates*. *See, e.g.*, Leslie A. Brueckner, *A Turning of the Tide for Preemption*, 41 Trial 28, 30 (Nov. 2005) ("The eagerly awaited decision . . . held 7-2 that common law design defect, manufacturing defect, negligent testing, and breach-of-express-warranty claims are *entirely exempt* from express preemption.") (emphasis added).

Justice Thomas, joined by Justice Scalia, filed in *Bates* a separate opinion which highlights the need for the Court to clarify that lower courts must analyze each claim, regardless of its name, form, or characterization, to determine whether it is based on a state-law rule that would impose requirements for labeling. In his opinion Justice Thomas noted that under § 136v(b), "States . . . may not impose liability for labeling requirements predicated on distinct state standards of care."

Bates, 544 U.S. at 455 (Thomas, J., concurring in the judgment in part and dissenting in part). Then he indicated that "the majority omits a step in its reasoning that should be made explicit: A state-law cause of action, *even if not specific to labeling, nevertheless imposes a labeling requirement* 'in addition to or different from' FIFRA's when it attaches liability to statements on the label that do not produce liability under FIFRA." *Id.* at 456. This "missing step" in the Court's *Bates* opinion—a step which the Court now should make explicit—flatly contradicts the state supreme court's view here that only claims which are "very directly related" or "directly addressed" to labeling can be preempted.

Review is needed to ensure that the lower court's misinterpretation of the *Bates*' test for preemption, an error which other courts also have committed, does not proliferate any further. This Court has not hesitated to clarify its federal tort preemption jurisprudence where, as here, it is necessary to aid the lower courts and litigants. *See, e.g., Freightliner Corp. v. Myrick*, 514 U.S. 280, 287-89 (1995) (clarifying discussion in *Cipollone*, 505 U.S. at 517, which courts of appeals had misconstrued to mean that inclusion in a statute of an express preemption clause forecloses implied preemption); *cf. United States v. Locke*, 529 U.S. 89, 107 (2000) (clarifying that a frequently cited "fragmentary quote from *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) [regarding the "presumption against preemption"], does not support the scope given to it by the Court of Appeals"). CropLife America believes that it is important from the viewpoint of maintaining consistency in this Court's preemption jurisprudence that *Bates* not be misconstrued as elevating form over substance in determining whether a state-law cause of action is displaced. For this reason, the Court should grant review to clarify (or correct) *Bates*.

II. THE COURT SHOULD GRANT REVIEW BECAUSE THE LOWER COURT'S OPINION UNDERMINES THE STRUCTURE AND DISRUPTS THE OPERATION OF THE FEDERAL/STATE PESTICIDE REGULATORY SCHEME

CropLife America and its members view the Minnesota Supreme Court's decision in this nationwide class action as a serious threat to the structure and operation of the federal/state pesticide regulatory scheme. That court's post-*Bates* remand opinion, like its pre-*Bates* decision, upholds a jury verdict which requires an R&D-oriented pesticide manufacturer to pay tens of millions of dollars under a state consumer fraud statute on the theory that it engaged in an "unconscionable commercial practice" (i) by distributing a FIFRA-registered product with EPA-authorized and approved "subset" labeling only in states where the product had been registered, and (ii) by advocating against unlawful, potentially hazardous, off-label use of pesticides. If left undisturbed, this decision will continue to engender tremendous confusion and uncertainty within the regulated community, and in view of the potential financial rewards, almost certainly will spawn additional "consumer fraud" class action suits that further erode the pesticide regulatory scheme. *See, e.g.*, FarmLaw.com (hyping the farmers' trial court victory in the instant litigation).

1. The State Court's Opinion Abrogates the Important Role Played by the States in Registering Pesticides and the Need for Adequate Crop-By-Crop Testing on a Regional or Local Basis. Although § 136v(b) expressly preempts the states from imposing additional or different requirements for labeling, § 136v(a) specifies that they may "regulate the sale or use of any federally registered pesticide," provided that such regulation "does not permit any sale or use prohibited by [FIFRA]." 7 U.S.C. § 136v(a); *see Bates*, 544 U.S. at 446 n.20 (noting that "§ 136v(a) is merely declaratory of the au-

thority that the States retained after FIFRA"). Pursuant to this residual authority, the states have established their own individual state pesticide registration requirements, with which every FIFRA-registered product must comply prior to being sold or used. *See* Tr. at 2007:15-24; 2010:6-2011:1; 2068:5-2069:24; 2604:3-9; 2606:22-24; 2612:9-2613:7; 2615:13-2616:11 (testimony of parties' regulatory experts regarding state pesticide registration requirements geared to state and local agricultural and environmental conditions).

Under the federal/state scheme, a product *cannot* lawfully be marketed, advertised, sold, or used for a federally registered use (i.e., crop) in a particular state *unless and until* that state's pesticide regulatory agency, pursuant to the state's own pesticide registration requirements, has approved the product for that use in that state. In other words, a FIFRA registration *alone* is not a license to sell or use a pesticide product anywhere. *See Bates*, 544 U.S. at 442 & 442 n.14 (discussing the states' pesticide regulatory role); *Wisconsin Pub. Intervenor v. Mortier,* 501 U.S. 597, 613 (1991) ("FIFRA nowhere seeks to establish an affirmative permit scheme for the actual use of pesticides.").

Responsible product stewards like BASF extensively test their products for phytotoxicity (i.e., crop injury) on a crop-by-crop basis before making them available to farmers. Testing typically has to be conducted on a regional or local basis, in order to take into account differing soil, terrain, climatic, environmental, and other conditions. In addition, because farmers commonly "tank mix" different pesticide products prior to application, testing on various combinations of products often has to be conducted to ascertain whether a tank mixture will be phytotoxic when applied to crops grown in a particular region or state. The results of these and other types of phytotoxicity testing very well may determine the particular states in which a product should be sold and used, and thus, registered.

If a manufacturer chooses to refrain from marketing a FIFRA-registered product in Minnesota, North Dakota, or any other particular state, nothing in the statute requires the manufacturer to obtain a registration from that state. The lower court's ruling, however, appears to impose liability for BASF's forbearance from rushing to farmers a product which had not been fully tested, on a region-by-region basis, for phytotoxicity on minor crops. *See* Pet. at 5. Growers can hardly afford to destroy or damage their low-acreage minor crops with a product or tank mixture that has not been tested for crop safety under varying regional or local conditions. Nor can pesticide manufacturers bear that risk. Indeed, the state court's decision shatters whatever fragile incentives manufacturers like BASF may have for diverting limited R&D resources to development of test data needed to register new or existing pesticides for use on minor crops.[4] The ruling appears to impose financial liability upon BASF *for the very reason* that it made such an investment by registering its thoroughly tested Poast herbicide, on both a federal and state level, for use on dozens of minor crops, *see* Pet. at 4, but refrained from doing the same for the newer Poast Plus, which BASF indicates had not been adequately tested for phytotoxicity to minor crops, *id.* at 5. If the ruling is allowed to stand, the inevitable consequence will be that already scant incentives for manufacturers to develop or expand products for use on minor crops will evaporate. Many minor crop

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[4] Because of the long-standing need to maintain and bolster pesticide manufacturers' incentives to develop products suitable for use on minor crops, Interregional Research Project No. 4 ("IR-4") was established in 1963 as a cooperative effort between USDA and state agricultural research centers. *See* Tr. at 3245. IR-4 Executive Director Robert Holm testified at the trial below that the program's "sole purpose is to provide crop-protection solutions for minor crop growers, the rationale being that . . . crop-protection companies *lacked the economic incentive* to develop their chemicals on minor crops." *Id.* at 3246 (emphasis added).

growers throughout the nation then will be deprived of the pesticide products that they need.

2. In Violation of § 136v(b), the State Court's Opinion Imposes Liability for a Manufacturer's Use of EPA-Authorized Subset Labeling, Which Is an Essential Component of the Federal/State Regulatory Scheme, and Until Now, a Common and Beneficial Commercial Practice. The lower court's holding that a pesticide manufacturer's use of EPA-authorized subset labeling somehow represents an "unconscionable commercial practice," punishable by payment of treble damages under a vague state consumer protection law, thwarts the objectives of this necessary and widely utilized federal labeling practice, which is highly beneficial to farmers and other pesticide users, as well as to manufacturers.

EPA's long-standing subset labeling regulation allows a pesticide manufacturer to distribute a product with labeling that lists less than all of its FIFRA-registered uses:

> A registrant may distribute or sell a product *under labeling bearing any subset* of the approved directions for use, provided that in *limiting the uses listed on the label*, no changes would be necessary in precautionary statements, use classification, or packaging of the product.

40 C.F.R. § 152.130(b) (emphasis added). In other words, EPA does not require the labeling accompanying a pesticide product to identify all of the uses (i.e., crops) encompassed by that product's FIFRA registration.

Without subset labeling, a manufacturer would have to list all FIFRA-registered crops, even those for which a registration has not been sought or obtained in a particular state. Selling the product with such all-encompassing labeling would violate that state's registration requirements. As a result, the manufacturer could not lawfully sell the product at all within that state, not even for use on the crops which have

received the st[illegible]s approval. Farmers then would be deprived of beneficial crop protection products. Alternatively, a manufacturer could seek state registration before a product is fully tested for use on specific crops under the soil, climatic, environmental, and other conditions present in the particular state or region. That, too, would be problematic for both farmers and manufacturers. Therefore, subset labeling is a *regulatory necessity*. It enables a FIFRA-registered product to be sold for those crops which have received state as well as EPA approval, while avoiding violation of state registration requirements for other crops. Equally important, it affords a manufacturer the opportunity to complete safety testing of the product on such other crops before seeking state registrations.

Subset labeling also is important for commercial reasons. When EPA promulgated the subset labeling regulation in 1988, it formalized a long-standing policy which affords manufacturers flexibility in deciding how to market multi-use (e.g., multi-crop) products. *See* 53 Fed. Reg. 15,952, 15,957 (May 4, 1988) ("A company having a registered product is permitted (both by current policy and by this final rule) to market the product in a variety of ways."). Thus, a "product may be marketed . . . *bearing different subsets of approved uses* . . . to distinguish primary uses for different regions of the country." *Ibid.* (emphasis added). For example, utilizing subset labeling, a manufacturer is permitted to sell the same herbicide product in Mississippi labeled only for use on cotton and in Iowa labeled only for use on corn. Along the same lines, subset labeling affords a manufacturer the flexibility to address special regional or local considerations (e.g., soil types, climatic parameters, pest biotypes, and presence of endangered species) for safe and efficacious use of a product on a particular type of crop.

Also, a pesticide product's FIFRA registration may cover both agricultural crop uses and non-agricultural uses (e.g., home, lawn, and garden uses). In such a case, a manufacturer

can use subset labeling to distinguish between the agricultural and non-agricultural uses of the same product, which might be packaged (as well as labeled) differently for each category. Without subset labeling, manufacturers would have to try to obtain multiple FIFRA registrations for the same product in order to avoid including agricultural and non-agricultural uses on the same labeling. But "[e]xpanding usage of a single product is often more desirable from a marketing perspective (and usually easier to accomplish) than registering a number of similar products, each with fewer uses." 49 Fed. Reg. 37,960, 37,971 (Sept. 26, 1984). Thus, subset labeling conserves EPA's limited resources and provides a way for manufacturers to select from among a product's EPA-approved uses, those that meet the needs of different types of users.

The opinion below severely disrupts the federal/state regulatory scheme by rendering use of subset labeling a perilous practice. Yet, the subset labeling regulation, which specifically authorized BASF to omit minor crop uses from its Poast Plus labeling, necessarily represents EPA's determination that including less than all FIFRA-registered crops on an agricultural pesticide product's labeling does *not* render that labeling deceptive (i.e., misbranded). As a result, any state-law claim, such as Respondents' claims here, which are based on a duty requiring a manufacturer to list all FIFRA-registered crops on a pesticide product's labeling, necessarily imposes a requirement for labeling which is *not* "equivalent to, and fully consistent with, FIFRA's misbranding provisions," *Bates*, 544 U.S. at 447, but instead, "diverges from [the labeling requirements] set out in FIFRA and its implementing regulations," *id.* at 452. Such claims, therefore, are expressly preempted by § 136v(b) under the *Bates* test.[5]

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[5] For similar reasons, Respondents' claims that it was deceptive for BASF not to label Poast Plus the same as Poast also are preempted because they are based on duties which diverge from EPA's requirements (i) that separately registered products be distributed with their own sepa-

3. The State Court's Opinion Imposes Liability for Advocating Compliance With, and Facilitating Enforcement of, FIFRA's Prohibition Against Misuse of Pesticides, Which Is a Fundamental Precept of the Federal/State Regulatory Scheme. FIFRA makes it "unlawful for any person . . . to use any registered pesticide in a manner inconsistent with its labeling." 7 U.S.C. § 136j(a)(2)(G). One egregious example of such unlawful misuse is applying a pesticide to a crop that is not listed on its labeling.

Nevertheless, Respondents contended at trial that BASF engaged in "unconscionable" conduct by reminding farmers that off-label use of pesticides (e.g., use of a pesticide product on crops not included on its labeling) is unlawful, and by providing information to state pesticide enforcement officials, which led to prosecutions of certain pesticide dealers and farmers for off-label use. *See* Pet. at 8, 24. The opinion below held that this conduct was "deceptive," Pet. App. at 15a, and affirmed imposition of state-law liability based in part on these activities.

Off-label use (i.e., misuse) of agricultural pesticide products can cause serious problems such as crop damage, illegal pesticide residues in food crops, pesticide drift or runoff, and hazards to applicators, bystanders, domestic animals, and wildlife. The lower court's ruling, which appears to impose liability upon BASF for advocating against the off-label use of pesticides, sends shockwaves through the federal/state regulatory structure. If left undisturbed, the opinion below will leave manufacturers with the choice of either looking the other way when they suspect that their products are being

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rately approved labeling, *see* 40 C.F.R. §§ 152.130(a), 156.10(a)(1), and (ii) that to avoid confusion, different products be distributed with different names, *see* EPA Label Review Manual (3d. ed. 2003), Ch. 12: Labeling Claims, at Part IV.C ("The exact same name cannot be used for different products registered by any one registrant. The product name must be sufficiently different to clearly distinguish one product from another.").

misused, or incurring the risk of massive state-law liability by reporting possible misuse. Either way, the impact of the state supreme court's opinion severely undermines FIFRA's prohibition against misuse of pesticides.

FIFRA's prohibition against using a pesticide in a manner inconsistent with its labeling is commonly known by the maxim "The Label is the Law." During the trial court proceedings below, Dan Barolo, who served as Director of EPA's Office of Pesticide Programs, testified that "[t]he absolute underpinning and foundation of the program is embodied in this particular statement." Tr. at 2556. The record of this case reflects that when North Dakota's agriculture commissioner requested EPA to provide an "enforcement waiver" so that farmers could violate § 136j(a)(2)(G) by applying Poast Plus for crops not listed on its labeling, Dr. Lynn Goldman, EPA's then Assistant Administrator for pesticides, responded as follows:

> It is critical for us to keep in mind that, under FIFRA, *the label is the law*. . . . To move away from this basic precept and inform farmers that it is acceptable to substitute different products with different approved labels has serious national implications with regard to the health and safety of farmers and workers. . . . If EPA were to *undermine the basic understanding by farmers that they must follow the labeling on a specific product,* we would cause confusion in the regulated community, and, in effect, *be encouraging pesticide misuse.*

Def. Ex. 636 (emphasis added). By holding a pesticide manufacturer liable under state law for discouraging the misuse of agricultural pesticides, the state court's opinion causes the exact type of "serious national implications" and "confusion in the regulated community" which EPA sought to prevent by refusing an enforcement waiver for off-label use of Poast Plus. Furthermore, Congress decided to rely upon *the states* to enforce FIFRA's prohibition against misuse of

pesticides. *See* 7 U.S.C. § 136w-1(a) ("State Primary Enforcement Responsibility"). The lower court's opinion warrants this Court's review because it flouts that important state enforcement responsibility by condoning imposition of state-law liability on a manufacturer for promoting compliance with pesticide labeling.

CONCLUSION

The petition for a writ of certiorari should be granted.

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In the Supreme Court of the United States

BASF CORPORATION,

Petitioner,

v.

RONALD PETERSON, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Minnesota

MOTION OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, the Product Liability Advisory Council, Inc. ("PLAC") moves for leave to file the accompanying brief as *amicus curiae* in support of the petition for a writ of certiorari. Counsel for petitioner has consented to the filing of this brief, but counsel for the respondents has withheld consent.

PLAC is a non-profit corporation with 127 corporate members representing a broad cross-section of American industry. Its corporate members include manufacturers and sellers of products such as automobiles, aircraft, electronics, chemicals, pesticides, pharmaceuticals, and medical devices. A list of PLAC's current corporate membership is included in an appendix to the accompanying brief.

PLAC's primary purpose is to file *amicus curiae* briefs in cases raising issues that affect the development of product liability law and have potential impact on PLAC's members. PLAC has submitted hundreds of *amicus* briefs in the state and federal appellate courts, including in many of this Court's cases involving issues of federal preemption. See, *e.g.*, *Bates* v. *Dow AgroSciences, Inc.*, 544 U.S. 431 (2005); *Buckman* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001); *Geier* v. *American Honda Co.*, 529 U.S. 861 (2000); *Norfolk S. Ry.* v. *Shanklin*, 529 U.S. 344 (2000); *United States* v. *Locke*, 529 U.S. 89 (2000); *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470 (1996). In addition, PLAC filed *amicus* briefs in this case in the Minnesota Court of Appeals, the Minnesota Supreme Court, and this Court (when the case was last here on petition for a writ of certiorari). See *BASF Corp.* v. *Peterson*, 544 U.S. 1012 (2005) (order) (granting PLAC's motion for leave to file *amicus* brief, granting the petition, vacating the judgment below, and remanding for reconsideration in light of *Bates*). Because many of PLAC's members manufacture products that are subject to preemptive federal requirements, they have a vital interest in the

development of the law of preemption and the proper resolution of this case.

PLAC's motion for leave to file the accompanying brief as *amicus curiae* should be granted.

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BRIEF FOR THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The interest of the *amicus curiae* is described in the accompanying motion for leave to file this brief.

STATEMENT

1. The Supremacy Clause of the Constitution provides that "the Laws of the United States * * * shall be the supreme Law of the Land * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. State and local laws that conflict with federal law are preempted "by direct operation of the Supremacy Clause" – that is, without regard to whether the federal statute, regulation, or treaty in question contains a provision specifying the extent of preemption. *Brown* v. *Hotel & Restaurant Employees & Bartenders Int'l Union*, 468 U.S. 491, 501 (1984).

2. The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y, vests the Environmental Protection Agency ("EPA") with broad authority to regulate the labeling and packaging of pesticides sold in the United States. EPA has exercised that authority by, among other things, promulgating detailed specifications for pesticide labeling. See, *e.g.*, 40 C.F.R. § 156.10.

In enacting FIFRA, Congress took steps beyond merely relying on the Supremacy Clause and long-settled principles of "implied" preemption to protect the EPA's authority to regulate pesticide labeling and packaging.[2] To that end, FIFRA contains

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[1] Pursuant to Rule 37.6 of the Rules of this Court, PLAC states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] "Implied" preemption covers situations where there is no explicit

a preemption clause – aptly titled "uniformity" – expressly barring states from imposing on federally registered pesticides "*any* requirements for labeling or packaging" that are "in addition to or different from those required under" federal law. 7 U.S.C. § 136v(b) (emphasis added). This provision extends the natural and automatic effect of the Supremacy Clause because it nullifies state labeling and packaging requirements that are "different from" or "in addition to" (even if not in conflict with) federal requirements for labeling or packaging.

In contrast, FIFRA expressly confirms the states's role in regulating the "sale or use" of pesticides (although states may not "permit any sale or use" that is "prohibited by" federal law). 7 U.S.C. § 136v(a). Under FIFRA, a pesticide (including a herbicide) may not be distributed or used in the United States unless first registered by EPA. *Id.* § 136a(a). But the states may (and all do) require separate registration (*i.e.*, approval) of pesticides for particular uses, and any state may refuse to permit the sale or use of an EPA-registered pesticide within its borders. *Id.* § 136v(a); Pet. 3, 5 n.1; *Amicus* Brief of CropLife America ("CLA *Amicus* Br."), at 12-13.

3. In the decision below, the Minnesota Supreme Court upheld a $52 million treble-damages judgment against petitioner BASF Corporation, a manufacturer of pesticides, in a nationwide class action brought under the New Jersey Consumer Fraud Act ("NJCFA"), N.J. STAT. ANN. §§ 56:8-1 to 56:8-116

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preemptive command by Congress ("express" preemption). Implied preemption falls into several categories. Implied *field* preemption occurs where federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Implied *conflict* preemption, in contrast, involves conflicts between state and federal law. Such conflicts can take a number of forms, ranging from situations where "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-43 (1963), to cases where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

(West 2002). Respondents are a class of all persons in the United States who purchased Poast, a herbicide made by BASF, between January 1, 1992, and December 31, 1996, for use on their crops (with the exception of certain North Dakota residents). Pet. ii. During the class period, Poast was more expensive than Poast Plus, another herbicide manufactured by BASF. The price differential between Poast and Poast Plus was the basis for respondents' consumer-fraud claims.

Over objection, a Minnesota jury was permitted to rely on two of BASF's labeling decisions concerning Poast in concluding that the company had committed an "unconscionable commercial practice" in violation of N.J. STAT. ANN. § 56:8-2 (West 2002). First, respondents claimed that it was "unconscionable" to put different names and labels on Poast and Poast Plus because the two herbicides have the same active ingredient. See Pet. 6-7, 16-17. Yet federal regulations *require* distinct product labeling for pesticides with the same active ingredients if their chemical formulae differ as much as Poast and Poast Plus do. See 40 C.F.R. §§ 152.15, 152.43, 158.175; Pet. 4, 22. Second, respondents claimed it was "unconscionable" to label and market Poast Plus, which was less expensive than Poast, for only a subset of its EPA-approved uses. See Pet. 7-8, 16, 18-19. Yet federal regulations *expressly authorize* pesticide manufacturers to engage in this practice (known as "subset labeling"). See 40 C.F.R. § 152.130(b); 53 Fed. Reg. 15952, 15957 (May 4, 1988); Pet. 3, 16.

4. The Minnesota Supreme Court has issued two opinions in this case. Pet. App. 1a-24a, 55a-81a. In its 2004 decision, the court rejected BASF's argument that respondents' NJCFA claims are both expressly and impliedly preempted by federal law. See *id.* at 70a-75a.

5. In April 2005, this Court issued its decision in *Bates* v. *Dow AgroSciences, Inc.*, 544 U.S. 431 (2005). *Bates* interpreted 7 U.S.C. § 136v(b) and thus clarified the scope of *express* preemption under FIFRA. It did not, however, decide any issue of *implied* preemption. The only mention of implied preemp-

tion was a passing reference to *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991), which rejected implied "field" preemption because FIFRA was not "sufficiently comprehensive" to give rise to the inference that Congress had "occupied" the entire "field" of "regulation of pesticide use" by municipal governments. See *Bates*, 544 U.S. at 441-42; *Mortier*, 501 U.S. at 606-07.

In his separate opinion concurring in part in the judgment and dissenting in part, Justice Thomas, joined by Justice Scalia, stated: "Because we need only determine the ordinary meaning of § 136v(b), the majority rightly declines to address [Dow]'s argument that petitioners' claims are subject to other types of pre-emption." *Bates*, 544 U.S. at 458. "Today's decision," Justice Thomas wrote, "thus comports with this Court's increasing reluctance to expand federal statutes beyond their terms through doctrines of implied pre-emption." *Id.* at 459.

6. This Court subsequently granted BASF's petition for certiorari, vacated the decision of the Minnesota Supreme Court, and remanded for reconsideration in light of *Bates*. See *BASF Corp.* v. *Peterson*, 544 U.S. 1012 (2005) (order).

7. On remand, the Minnesota Supreme Court again rejected BASF's preemption arguments. Pet. App. 1a-24a. As an initial matter, the court held that, under *Bates*, "state regulation must be *very directly related* to labeling and packaging in order to invoke FIFRA preemption." *Id.* at 13a (emphasis added). Next, the court indicated that this standard favored the respondents, because their claims were "not based on the content of the product labels, but rather on * * * nonlabel actions of BASF." *Id.* at 15a. The Minnesota Supreme Court took the view that express preemption turned on which side "more accurately characterize[s] the nature of the [respondents'] claims." *Id.* at 16a; see also *id.* at 18a ("[T]he fundamental debate is simply about how the farmers' claims are accurately characterized.").

Although *Bates* did not address *implied* preemption, the Minnesota Supreme Court nevertheless applied *Bates*'s test for express preemption to reject BASF's implied conflict preemp-

tion arguments. Affirming imposition of a $52 million punishment on the company in part for doing what federal law required, the Minnesota Supreme Court explained:

> [I]t appears to us that [BASF's] arguments that the farmers' claims would require BASF to label Poast and Poast Plus as one product and to market it in all states for all crops are in reality "effects-based" arguments. That is, the success of the farmers' claims might induce such conduct on the part of BASF. But, as explained above, the Supreme Court soundly rejected the effects-based inducement test for FIFRA preemption in *Bates*.

Pet. App. 18a n.14. Thus, the Minnesota Supreme Court treated this Court's rejection in *Bates* of the "inducement" test – which was part of this Court's interpretation of the phrase "requirements for labeling or packaging" (7 U.S.C. § 136v(b)) in FIFRA's express preemption clause – as restricting implied conflict preemption under the Supremacy Clause.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the decision below, the Minnesota Supreme Court upheld a massive $52 million treble-damages judgment against petitioner BASF for marketing a pesticide with labeling that was entirely in compliance with requirements imposed under federal law. In concluding that BASF's marketing activities were fraudulent and "unconscionable" under the New Jersey Consumer Fraud Act, the jury relied on BASF's correctly having "lead farmers to believe" that Poast Plus "could only be used" on the major crops listed on its label – and, in fact, was a different product from Poast, another pesticide manufactured by BASF that at the time was less expensive. Pet. App. 16a. Yet federal law *required* BASF to give different names to Poast Plus and Poast, and it explicitly *authorized* BASF to include only a subset of the federally registered uses of Poast Plus on the product labeling (with the result that non-listed uses were *in fact unlawful* for farmers to engage in). The premise of the multi-million-dollar award is thus in direct conflict with requirements

imposed by federal law and in derogation of choices expressly authorized by federal law. A more obvious collision between state and federal law is difficult to imagine.

The state/federal conflict is all the more striking because the judgment imposes a $52 million punishment on BASF. As this Court has repeatedly recognized, treble damages are "essentially punitive in nature." *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765, 784 (2000); see also *Texas Industries, Inc.* v. *Radcliffe Materials, Inc.*, 451 U.S. 630, 639 (1981) ("The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers."). The New Jersey courts have recognized that treble damages under the NJCFA, N.J. STAT. ANN. §§ 56:8-2, 56:8-19 (West 2002), serve not only to compensate the plaintiff "but also to punish the [defendant] and to deter others." *Furst* v. *Einstein Moomjy, Inc.*, 860 A.2d 435, 441 (N.J. 2004); see also *Cox* v. *Sears Roebuck & Co.*, 647 A.2d 454, 463 (N.J. 1994).

The Minnesota Supreme Court concluded that there was no preemption in this case, because under *Bates* the massive judgment does not reflect any "requirement" imposed by state law on Poast Plus's "labeling." That holding is fundamentally misguided. In Minnesota, there is now a very rigid labeling requirement: the labeling for all FIFRA-registered products must either list *all* of the federally registered uses or else disclose the existence of the federally registered uses that are not authorized by the manufacturer. This requirement certainly is different from federal law. In fact, it is *diametrically opposite* to federal law. The EPA's subset labeling rule allows a pesticide manufacturer to *refrain from* listing some of the federally registered uses, and federal law forbids the promotion or encouragement of off-label uses (which would occur if federally registered uses that are not authorized were included or referenced in the labeling).

The same is true of the product name. Under the decision below, Minnesota now requires that pesticides with similar

ingredients be labeled as the same rather than different products. Anything else can be attacked as deception and "unconscionable" conduct. But federal law forbids that very kind of labeling. Thus, state law is requiring misbranding under federal standards, backed by the threat of huge treble-damage punishments in class action proceedings. Under *Bates*, these requirements imposed under the New Jersey Consumer Fraud Act plainly are "different from, or in addition to" the requirements of federal law and thus are expressly preempted by Section 136v(b) of FIFRA. As petitioner and *amicus* CropLife America demonstrate, the lower court's express preemption holding conflicts with *Bates* and is manifestly incorrect.

Although that is reason enough for this Court to grant the petition, review is warranted for two additional reasons that will be the focus of this brief. First, the lower court's cramped and erroneous reading of *Bates* is deserving of review because of its potential to affect the many other express preemption clauses that target product "labeling." The existence of those other preemption regimes – and the likelihood that *Bates* and the decision below may be followed in those other statutory settings – underscores the broader importance of the issues raised and the need for this Court's review. Moreover, the procedural posture of this case – arising as it does following a jury verdict – makes it an ideal vehicle for clarifying how the lower courts should apply the *Bates* framework in this recurring setting.

Second, the Minnesota Supreme Court's treatment of BASF's arguments for *implied* preemption also deserves this Court's review. This is a compelling case for implied conflict preemption "by direct operation of the Supremacy Clause" (*Brown* v. *Hotel & Restaurant Employees & Bartenders Int'l Union*, 468 U.S. 491, 501 (1984)), because Minnesota has imposed a massive punishment on BASF for doing precisely what federal law requires and authorizes.

Implied preemption of the state court's judgment exists in this case *whether or not* that judgment imposes "requirements" for pesticide "labeling" that are "different from," or "in addition

to" requirements imposed under FIFRA within the meaning of 7 U.S.C. § 136v(b). Suppose, for example, that federal law required BASF to color Poast Plus red – or to make certain "oral representations" in connection with sales of Poast Plus to distributors or farmers. Even if under *Bates* those obligations are not "requirement[s] for labeling," they would still constitute federal directives that the states would not be free to undermine. Can there be any doubt that the Supremacy Clause would preempt a state law that imposed a $52 million punishment on BASF for using red coloration or for making such a federally compelled oral representation? Of course not. Such a punishment (whether or not it was a "labeling requirement") would directly conflict with federal law and thus be nullified by the Supremacy Clause.

The Minnesota Supreme Court failed to analyze or evaluate BASF's implied preemption arguments under this Court's precedents. The lower court even suggested, at one point, that this Court's analysis in *Bates* – specifically, its rejection of the "effects-based" argument relating to the meaning of Section 136v(b) – also limited the scope of *implied* preemption in this setting. The lower court's apparent misreading of *Bates* (including the separate opinion of Justice Thomas) as establishing that FIFRA's express preemption clause precludes litigants from advancing arguments based on implied conflict preemption is squarely at odds with *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 288-89 (1995) – and provides an additional reason why further review is needed.[3]

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[3] PLAC agrees with BASF and *amicus* Chamber of Commerce of the United States that the First Amendment issue raised in the petition for certiorari also warrants this Court's review. Especially troubling (and perplexing) is the Minnesota courts' imposition of state-law treble-damages liability on a manufacturer for truthfully reporting to responsible government authorities the illegal actions of third parties in connection with the use of the manufacturer's product. To meet space limitations and avoid redundant briefing, however, this brief focuses on the preemption question.

ARGUMENT

I. THE LOWER COURT'S EXPRESS-PREEMPTION HOLDING WARRANTS REVIEW

A. This Case Would Allow The Court To Clarify How The *Bates* Framework Should Be Applied To Verdicts Following A Full Trial

Preemption is an affirmative defense of law that is usually resolved on purely legal grounds at the threshold of or early in litigation (on a motion to dismiss or for summary judgment), as was true in *Bates*. See 544 U.S. at 435, 443 n.15. Thus, the target of the preemption defense ordinarily is the allegations in the plaintiff's complaint. For this reason, this Court has repeatedly stated that a plaintiff may *not* avoid preemption through artful pleading. See, *e.g.*, *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 214 (2004) ("[D]istinguishing between pre-empted and non-pre-empted claims based on the particular label affixed to them would 'elevate form over substance and allow parties to evade' the pre-emptive scope of ERISA simply 'by relabeling their contract claims as claims for tortious breach of contract.'") (quoting *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 211 (1985)); *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 324 (1981) ("[C]ompliance with the intent of Congress cannot be avoided by mere artful pleading.").

This case arises in the distinctive procedural setting of a judgment entered based on a jury verdict after a full trial. In rejecting BASF's arguments for express preemption under FIFRA in this setting, the Minnesota Supreme Court relied on a two-step analysis. First, it interpreted this Court's decision in *Bates* as limiting Section 136v(b) to state regulations that are "*very directly related* to labeling and packaging." Pet. App. 13a (emphasis added). Next, and more importantly for present purposes, the lower court suggested that express preemption under FIFRA should turn on whether there is some evidentiary support in the record for the plaintiffs' "characterization" of their claims (as relying on "nonlabel" conduct). See Pet. App. 15a. "Because we conclude that record supports the farmers'

characterization of their claims as based on nonlabel conduct," the court held, "under *Bates* there is no FIFRA preemption." *Id.* at 18a-19a (emphasis added).[4]

Further review is warranted in this case to clarify how the *Bates* framework for express preemption should be applied in the trial setting. The only guidance this Court gave in *Bates* concerning this recurring and important context – the admonition that "[i]f a case proceeds to trial, the court's jury instructions *must* ensure that nominally equivalent labeling requirements are genuinely equivalent" and "[i]f a defendant so requests, a court should instruct the jury on the relevant FIFRA * * * standards" (544 U.S. at 454 (emphasis altered)) – was disregarded by the Minnesota Supreme Court. Pet. 21-23.

The lower court's approach conflicts in several respects with this Court's decisions. Its heavy emphasis on respondents' "characterization" of their own claims gives rise to the very same risk of circumvention repeatedly condemned by this Court, and is inconsistent with this Court's teaching that "compliance with the intent of Congress cannot be avoided by mere artful pleading." *Kalo Brick*, 450 U.S. at 324. Further, the suggestion that express preemption hinges on whether there is evidentiary support in the record for a liability theory that is not preempted departs from this Court's usual approach to appellate review of a general verdict that rests on multiple alternative grounds, one or more of which is legally erroneous (here, because it is preempted). In a line of cases stretching back more than a century, this Court has made clear that a jury verdict must be vacated where it could rest on a number of different legal theories, some of which are legally defective. See *Maryland* v. *Baldwin*, 112 U.S. 490, 493 (1884); *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29-30 (1962); *Griffin* v. *United States*, 502 U.S. 46, 53-56, 59 (1991). The

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[4] As BASF (Pet. 14-21) and *amicus* CropLife America (CLA *Amicus* Br. 4-11) show, the lower court's interpretation of *Bates* is problematic in several important respects. Review is also warranted to address and correct the these aspects of the lower court's decision.

Minnesota Supreme Court's approach ignores that basic principle and allows FIFRA's express preemption clause to be circumvented in any case where the plaintiff can point to *some* record evidence of "off-label" conduct (which is to say, in virtually every case).[5]

B. The Decision Below Is Important Because It May Affect Other Express Preemption Clauses That Target Labeling Requirements

Although the Minnesota Supreme Court's evisceration of FIFRA's express preemption clause alone justifies review, the effects of the decision below are likely to be felt beyond the context of pesticide labeling. Many other provisions in the United States Code specifically preempt nonidentical state "requirements" that relate to product "labeling." Those include, for example, the Federal Hazardous Substances Act ("FHSA"), which Congress enacted to provide nationally uniform requirements for cautionary labeling of hazardous substances intended for household use. See *Moss* v. *Parks Corp.*, 985 F.2d 736, 739 (4th Cir.), cert. denied, 509 U.S. 906 (1993). The FHSA's express preemption clause declares that "no State * * * may establish or continue in effect a cautionary labeling requirement applicable to such substance or packaging * * * unless such cautionary labeling requirement is identical to the [FHSA] labeling requirement." 15 U.S.C. § 1261 note. Prior to *Bates*, some courts had concluded that, because of similarities in the statutory text, FHSA and FIFRA have identical preemptive reach. See, *e.g.*, *Chemical Specialties*

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[5] A pesticide manufacturer that has determined that no warning as to a particular matter is needed or desirable in the product labeling is highly unlikely to provide the omitted, unnecessary warning in television or radio advertisements, through oral representations of its sales agents, or in other communications outside the "labeling or packaging." Thus, a plaintiff whose essential complaint is the manufacturer failed to provide a warning in pesticide labeling is almost always able to point to communications outside the labeling or packaging that also lack the warning in question.

Mfrs. Ass'n, Inc. v. *Allenby*, 958 F.2d 941, 945 (9th Cir.), cert. denied, 506 U.S. 825 (1992).

When Congress enacted the current version of the FHSA preemption clause in 1976, it did so with the avowed purpose of creating "a uniform Federal preemption clause" for the FHSA and for three other federal statutes that include preemptive commands similar to FHSA's: the Consumer Product Safety Act (15 U.S.C. § 2075(a) (preempting, among other things, nonidentical state standards relating to the "packaging" or "labeling" of consumer products)); the Poison Prevention Packaging Act (*id.* § 1476(a) (same for state requirements relating to "special packaging" of certain household products)); and the Flammable Fabrics Act (*id.* § 1203(a)). See S. Rep. No. 94-251, 94th Cong., 2d Sess. 4, *reprinted in* 1976 U.S.C.C.A.N. 993, 996; H.R. Conf. Rep. No. 94-1022, 94th Cong., 2d Sess. 27-28, *reprinted in* 1977 U.S.C.C.A.N. 1017, 1030. Accordingly, these provisions have been treated as coextensive with FHSA's preemption clause.

In addition, at least 10 other federal statutes expressly preempt state "requirements" relating to product "labeling." Those include: (1) the Child Safety Protection Act, 15 U.S.C. § 1278 note (preempting state "requirement[s] relating to cautionary labeling" for toys, games, balloons, marbles and other products that present choking hazards to children); (2) the Fair Packaging and Labeling Act, *id.* § 1461 (preempting state laws governing "labeling" of certain consumer products); (3) the Magnuson-Moss Warranty Act, *id.* § 2311(c) (preempting certain state "requirement[s]" that relate to warranties in "labeling"); (4) the National Education and Labeling Act, 21 U.S.C. § 343-1(a) (preempting certain state "requirements" relating to food "labeling"); (5) the Poultry Products Inspection Act, *id.* § 467e (preempting certain state "requirements" relating to poultry "labeling"); (6) the Federal Meat Inspection Act, *id.* § 678 (preempting certain state "requirements" relating to meat "labeling"); (7) the Egg Product Inspection Act, *id.* § 1052 (preempting certain state "requirements" relating to egg product "labeling"); and (8) the Mercury-Containing and Rechargeable

Battery Act, 42 U.S.C. § 14322(e) (preempting certain state "labeling requirement[s]" for rechargeable batteries and rechargeable consumer products).[6]

Because of their apparent similarities with Section 136v(b) of FIFRA (at least when viewed in isolation), these preemption provisions potentially give rise to the same issues that are presented in this case. Not surprisingly, there is already substantial litigation in the lower courts over whether and how *Bates* applies to the foregoing statutes. Compare, *e.g.*, *Mills, M.D.* v. *Giant of Maryland, LLC*, 2006 WL 2165756, at *2-*4 (D.D.C. Aug. 2, 2006) (failure-to-warn claims relating to milk are preempted by the National Education and Labeling Act, 21 U.S.C. § 343-1(a); FIFRA is distinguishable and *Bates* does not require rejection of the preemption defense) *with Vermont Pure Holdings, Ltd.* v. *Nestle Waters North America, Inc.*, 2006 WL 839486, at *3-*7 (D. Mass. Mar. 28, 2006) (relying on *Bates* and overruling magistrate's recommendation in case involving preemption under 21 U.S.C. § 343-1(a)).

Undoubtedly, the Minnesota Supreme Court's cramped interpretation of FIFRA preemption and of this Court's decision in *Bates* is likely to be the subject of litigation in a variety of other preemption settings. For that reason as well, the decision below is important and warrants further review.[7]

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[6] See also 42 U.S.C. § 6297(a) (preempting certain state "labeling requirements" relating to energy consumption or water use with respect to certain products); *id.* § 6363(e)(1) (preempting certain state labeling requirements concerning containers of recycled oil).

[7] The nature of the state-law claims involved here also make this case an ideal vehicle for clarifying *Bates*. Respondents are a nationwide class of farmers who brought suit under a single state's consumer fraud statute, the NJCFA, which broadly forbids any "unconscionable commercial practice" (N.J. STAT. ANN. § 56:8-2 (West 2002)) – and is among the most far-reaching consumer fraud statutes in the country. See *International Union of Operating Engineers Local No. 68 Welfare Fund* v. *Merck & Co.*, 894 A.2d 1136, 1143 (N.J. Super. A.D.), appeal granted, 902 A.2d 1232 (N.J. 2006). Class actions of this kind (based on the

II. THE LOWER COURT'S FLAWED TREATMENT OF BASF'S IMPLIED-PREEMPTION ARGUMENTS ALSO WARRANTS REVIEW

Congress's preemptive intent may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977). State and local laws that conflict with federal law are preempted "by direct operation of the Supremacy Clause." *Brown* v. *Hotel & Restaurant Employees & Bartenders Int'l Union*, 468 U.S. 491, 501 (1984). Even if state law falls outside of the reach an express preemption clause, it may nevertheless be preempted if it conflicts with federal law or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 31 (1996); *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). See also note 2, *supra*.

Although BASF argued below that respondents' claims were barred by both express and implied preemption, the Minnesota Supreme Court never mentioned implied conflict preemption. To the extent the lower court addressed BASF's underlying reasons for why state and federal requirements were in direct conflict, it suggested that the BASF's argument failed under *Bates*'s test for express preemption. See pages 4-5, *supra*. Specifically, the Minnesota Supreme Court treated this Court's rejection in *Bates* of the "inducement" test as imposing similar limits on the scope of implied conflict preemption under the Supremacy Clause – even though that rejection was expressly based on specific features of the text of 7 U.S.C. § 136v(b). The lower court's handling of implied conflict preemption was seriously flawed and provides an independent reason why this Court's review is needed.

NJCFA and other broad state consumer fraud provisions) have become increasingly common in recent years in the state courts. Review would clarify how such broad claims of "unconscionable conduct" should be analyzed under the *Bates* framework.

A. *Bates* Does Not Preclude Arguments Based On Implied Conflict Preemption Or Articulate Limits On The Supremacy Clause

In *Freightliner Corp.* v. *Myrick*, 514 U.S. 280 (1995), this Court rejected as "without merit" the contention that the presence of an express preemption provision "entirely forecloses any possibility of implied pre-emption." 514 U.S. at 287-88. In so doing, the Court clarified a pervasive misunderstanding that had developed in the lower courts concerning a passage in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 517 (1992), that purported to invoke "a variant of the familiar principle of *expressio unius et exclusio alterius*: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." Compare *id.* at 547 (Scalia, J., joined by Thomas, J., concurring in the judgment in part and dissenting in part) (criticizing the analogy to the *expressio unius* principle in this setting, at least as applied to implied conflict as opposed to implied field preemption).

The Minnesota Supreme Court fell into the same error in this case. The idea that when Congress includes an express preemption provision in a statute, it thereby declares open season on everything else in the Act – and allows states to pass laws that directly conflict with federal law – is woefully mistaken. It is wrong as a matter of constitutional law because Congress lacks the power to modify the commands of the Supremacy Clause. Likewise, it makes little sense as a guideline for Congress's likely intent. A far more sensible assumption is that Congress is presumptively aware of the backdrop of existing law – including the ordinary rules of implied preemption that are applied to *all* statutes – when it legislates. See *American Nat'l Red Cross* v. *S.G.*, 505 U.S. 247, 252, 260 (1992). Thus, Congress enacts an express preemption clause when it wishes to *go beyond* the usual principles of implied preemption that operate as a default. Perhaps for that reason, the Court before *Cipollone* had repeatedly considered implied preemption arguments notwithstanding the applicability

of express preemption clauses.[8] And it has continued to do so since *Cipollone* and *Myrick*. See, *e.g.*, *Boggs* v. *Boggs*, 520 U.S. 833, 844 (1997) (deciding case on basis of implied conflict preemption under ERISA even though that statute has an express preemption clause); *Buckman Company* v. *Plaintiffs' Legal Committee*, 531 U.S. 341 (2001) (holding that "fraud on the agency" claims are impliedly preempted by the Medical Device Amendments, which contain an express preemption clause). See also *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 869 (2000) (holding that even the inclusion of a "savings" clause in a preemption scheme "does not bar the ordinary working of conflict pre-emption principles").

The Minnesota Supreme Court may well have mistakenly accepted the *expressio unius* principle based on a misreading of *Bates*, which makes only a passing reference to implied preemption (taking note of the rejection of field preemption in *Wisconsin Public Intervenor* v. *Mortier*, 501 U.S. 597 (1991)), and otherwise limits its analysis to express preemption under 7 U.S.C. § 136v(a). Moreover, Justice Thomas's separate opinion commended the majority for "rightly declin[ing] to address [Dow]'s argument that petitioners' claims are subject to other types of pre-emption," explaining that this action "comports with this Court's increasing reluctance to *expand* federal statutes beyond their terms through doctrines of implied pre-emption." 544 U.S. at 458-59 (Thomas, J., joined by Scalia, J.) (emphasis added). That statement might have been misunderstood by the lower court as endorsing the *expressio unius* principle rejected in *Myrick*. Yet Justice Thomas's opinion goes on to suggest that it is appropriate for courts to

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[8] See, *e.g.*, *Wisconsin Public Intervenor* v. *Mortier*, 501 U.S. 597, 611-12 (1991) (applying implied preemption analysis to FIFRA notwithstanding conclusion that municipal ordinance at issue not expressly preempted); *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 142-43 (1990); *Northwest Cent. Pipeline Corp.* v. *State Corp. Comm'n of Kansas*, 489 U.S. 493, 509-22 (1989); *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 526, 540-43 (1977).

engage in an "inquiry into whether the ordinary meanings of state and federal law conflict" (*id.* at 459) – and there was no argument by the manufacturer in *Bates* (unlike here) that state law was directly contrary to federal mandates and federally granted options (only arguments for implied field and implied obstacle preemption). See No. 03-388 Resp. Br. 36-37.

Courts and commentators have disagreed about the significance of this Court's treatment of implied conflict preemption in *Bates* – and its broader significance, if any, for preemption law. Compare, *e.g.*, Jean Eggen, *The Normalization of Product Preemption Doctrine*, 57 ALA. L. REV. 725, 749 (2006) (stating that "it may seem strange" that *Bates* "did not directly address why conflict preemption principles did not fit into its analysis" and surmising that Court "drew a functional line between situations in which implied preemption may operate and those in which it clearly would not") *with Wuebker* v. *Wilbur-Ellis Co.*, 418 F.3d 883, 887-88 (8th Cir. 2005) (in post-*Bates* case involving FIFRA, examining arguments for implied preemption). Further review is warranted to clarify this aspect of *Bates* and explain that the limits expressed in Section 136v(b) do not place any restriction on the Supremacy Clause or the doctrine of implied conflict preemption.

B. State Law May Not Impose Treble-Damages Liability On A Manufacturer For Exercising A Choice Granted By Federal Law

Once it is recognized that *Bates* does not bar arguments based on implied conflict preemption, it is clear that respondents' claims are preempted by the Supremacy Clause. Respondents' theory of liability was that BASF "unconscionably exploited the regulatory standards and overtly deceived and lied to farmers to conceal the fact that the less expensive Poast Plus was registered with the EPA for the same crops as Poast." Pet. App. 85a. At trial, some of respondents were far more blunt, arguing that it was "unfair, unethical, [and] immoral" for BASF *not to label* Poast Plus for minor crops

when "both [Poast and Poast Plus] were registered by EPA." Tr. 1169-1170 (emphasis added).

This theory of liability is impliedly preempted because it directly conflicts with federal law. BASF's decision to label Poast Plus for only a subset of the crops for which it was EPA-approved was an option explicitly authorized by federal regulations. See 40 C.F.R. § 152.130(b) ("A registrant may distribute or sell a product under labeling bearing any subset of the approved directions for use."). As explained by BASF (Pet. 4-5, 6, 19-20), this subset labeling option serves several salutary purposes. First, even if a pesticide has EPA's approval, its manufacturer may believe it has not been tested sufficiently on a particular crop (such as an especially minor crop). Second, in the event a manufacturer has trouble obtaining state registration for a particular crop, subset labeling allows it to release that product for use on other, approved crops. Subset labeling also allows manufacturers greater freedom in marketing their products. See generally CLA *Amicus* Br. 15-17.

In a series of cases, this Court has made clear that a state law is impliedly preempted if it would undermine or prohibit an option granted by Congress or by a pertinent federal agency. *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 881-82 (2000); *Barnett Bank*, 517 U.S. at 31; *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 155 (1982). In *de la Cuesta*, this Court held that a federal law authorizing savings and loan associations to use particular "due-on-sale" clauses in loan agreements impliedly preempted a state law prohibiting such federally approved clauses. 458 U.S. at 156. Similarly, in *Barnett Bank*, this Court held that a federal statute guaranteeing that certain banks could "act as the agent for any fire, life, or other insurance company * * * by soliciting and selling insurance" (12 U.S.C. § 92) impliedly preempted the order of a state insurance commissioner, based on a state statute, directing a bank to stop selling insurance. Because the state statute conflicted with the bank's federal authorization to sell insurance, the Court held that it was impliedly preempted.

More recently, in *Geier*, this Court held that a federal regulation granting auto manufacturers the option of "choos[ing] among different passive restraint mechanisms, such as airbags, automatic belts, or other passive restraint technologies" (529 U.S. at 878) preempted a state tort action imposing liability for exercising that option in a certain way. The Court recognized that any liability predicated on a duty to install airbags would necessarily imply that choices *other than* airbags were inadequate even though they were federally sanctioned, a conclusion that in turn would "present[] an obstacle to the variety and mix of devices that the federal regulation sought." *Id.* at 881. It therefore held that plaintiff's tort claim was impliedly preempted.

This line of cases is dispositive here. Federal regulations allowed BASF to label Poast Plus for use on only a subset of the crops for which EPA approved it. The conclusion that BASF engaged in fraudulent marketing by failing to list all permissible uses of Poast Plus conflicts with this regulation because liability stems directly from the decision to use subset labeling, a decision EPA consciously left to the manufacturer. The result is especially perverse in this case because, as the petition notes (at 5), BASF's decision not to seek state registration for Poast Plus for minor crops was based on the insistence of company scientists that additional testing be conducted prior to marketing the product for those uses in order to ensure safety.

In rejecting BASF's argument, the Minnesota Supreme Court reasoned that liability was imposed on BASF based not on the company's choice to use subset labeling, but rather on its misleading statements regarding Poast Plus's registration. The lower court pointed out that respondents relied on the fact that BASF advertised Poast as the "only" post-emergent grass herbicide registered for use on minor crops, even though EPA had also approved the cheaper Poast Plus for that use. Pet. App. 16a. But BASF could not have advertised its product for uses as to which federal, but not state registration, had been obtained without running afoul of the federal prohibition against the promotion of off-label uses. See 7 U.S.C. §§ 136j(a)(1)(B),

136j(a)(2)(G). It is clear in any event that BASF could have avoided liability under respondents' theory only by relinquishing its federally conferred right to engage in subset labeling and seeking state registration for all uses in every state. If that were required to avoid liability under state law, however, the federal right to engage in subset labeling would be a nullity.

C. State Law May Not Impose Treble-Damages Liability On A Manufacturer For Obeying The Requirements Of Federal Law

Respondents' claims under the NJCFA were also predicated on the assertion that BASF committed "unconscionable conduct" when it misrepresented that Poast and Poast Plus were different products. But BASF's decision to give Poast and Poast Plus distinct names and labels was *compelled* by federal law. If federal regulations compel an action that state law punishes, the state law must give way. See *United States* v. *Locke*, 529 U.S. 89, 109 (2000) ("conflict pre-emption * * * occurs when compliance with both state and federal law is impossible") (internal quotation marks omitted).

It is undisputed that federal law required BASF to give separate names and labels to the two herbicides. EPA assigned the two products different registration numbers (D Exs. 694, 701), required BASF to submit separate toxicology data for each (see 40 C.F.R. § 158.340), and mandated that the two products be given different names. See 40 C.F.R. § 152.43. To the extent that the jury based its finding of fraud on BASF's decision to label these "identical" products differently, such liability squarely conflicts with federal law and thus is impliedly preempted.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

PRODUCT LIABILITY ADVISORY COUNCIL, INC.
LIST OF CORPORATE MEMBERS

3M
A.O. Smith Corporation
Altec Industries
Altria Corporate Services, Inc.
American Suzuki Motor Corporation
Amgen Inc.
Anheuser-Busch Companies
Appleton Papers, Inc.
Arai Helmet, Ltd.
Astec Industries
BASF Corporation
Bayer Corporation
Bell Sports
Beretta U.S.A Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
Black & Decker (U.S.) Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone Americas Holding, Inc.
Briggs & Stratton Corporation
Brown-Forman Corporation
CARQUEST Corporation
Caterpillar Inc.
Chevron Corporation
Continental Tire North America, Inc.
Cooper Tire and Rubber Company
Coors Brewing Company
Crown Equipment Corporation
DaimlerChrysler Corporation
The Dow Chemical Company
E & J Gallo Winery

E.I. DuPont De Nemours and Company
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Estee Lauder Companies
Exxon Mobil Corporation
Ford Motor Company
Freightliner LLC
Genentech, Inc.
General Electric Company
General Motors Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Guidant Corporation
Harley-Davidson Motor Company
The Heil Company
Honda North America, Inc.
Hyundai Motor America
ICON Health & Fitness, Inc.
Illinois Tool Works, Inc.
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Jarden Corporation
Johnson & Johnson
Johnson Controls, Inc.
Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Koch Industries
Kolcraft Enterprises, Inc.
Komatsu America Corp.
Kraft Foods North America, Inc.
Lincoln Electric Company
Magna International Inc.
Masco Corporation

Mazda (North America), Inc.
Medtronic, Inc.
Mercedes-Benz of North America, Inc.
Merck & Co., Inc.
Michelin North America, Inc.
Microsoft Corporation
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.
Nintendo of America, Inc.
Niro Inc.
Nissan North America, Inc.
Novartis Consumer Health, Inc.
Novartis Pharmaceuticals Corporation
Occidental Petroleum Corporation
PACCAR Inc.
Panasonic
Pentair, Inc.
Pfizer Inc.
Porsche Cars North America, Inc.
PPG Industries, Inc.
Purdue Pharma L.P.
Putsch GmbH & Co. KG
The Raymond Corporation
Raytheon Aircraft Company
Remington Arms Company, Inc.
Rheem Manufacturing
RJ Reynolds Tobacco Company
Sanofi-Aventis
Schindler Elevator Corporation
SCM Group USA Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Sturm, Ruger & Company, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)

Terex Corporation
Textron, Inc.
TK Holdings Inc.
The Toro Company
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW Automotive
Tyson Foods, Inc.
Vermeer Manufacturing Company
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Water Bonnet Manufacturing, Inc.
Watts Water Technologies, Inc.
Whirlpool Corporation
Wyeth
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.